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PUBLIC ARBITRATION IN  
ATHENIAN LAW

A DISSERTATION SUBMITTED TO THE  
FACULTY OF THE DIVISION OF THE  
HUMANITIES IN CANDIDACY FOR THE  
DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF GREEK LANGUAGE AND LITERATURE  
1934

By  
HANSEN CARMINE HARRELL

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## PREFACE

The public arbitrators of ancient Athens have attracted the attention of scholars for many years. But the works of Hudtwalcker and Meier, though admirable for their time, are nevertheless hopelessly antiquated at the present day. Hubert, most of whose conclusions are accepted by Lipsius in *Das Attische Recht*, made a brilliant effort to solve many of the problems involved, and his solutions are for the most part remarkably close to the truth, especially in view of the fact that he was forced to rely upon what could be gleaned from the Attic Orators and very undependable accounts in the lexicographers for most of his evidence. However, the memorable appearance of Aristotle's treatise on the Constitution of Athens in 1891 put the entire question in a new light. An attempt was made soon afterwards by Pischinger to assimilate the new information furnished by Aristotle to what was already known. More modern scholars have unfortunately not been able to accept his explanations in all cases; there has been a particular need for further work upon the date of public arbitration, arbitral procedure, and the jurisdiction of the arbitrators. Hence it was in a desire to present these subjects afresh, and to restate the entire subject in the light of modern scholarship, that this work was undertaken.

The writer wishes to express his greatest thanks and appreciation to Prof. R. J. Bonner of the University of Chicago, who proposed the subject and made invaluable suggestions throughout, and to whom unreserved credit must be given for many of the views adopted herein.

In this study exactness required frequent quotation from the original Greek sources. These quotations are for the most part self-explanatory, being either paraphrased in English in the text itself or made unmistakably clear by the context. Inasmuch, however, as the work may be of interest to students of history and of law who have no Greek whatever, it has seemed advisable to add, at the end of the work, "Appended Translations" of Greek words or passages occurring in the text wherever more help seemed called for. No attempt has been made to translate or explain the Greek quoted in the notes, since they will no doubt be read only by the expert.

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## CHAPTER I

### THE FORTY AND THE INSTITUTION OF THE PUBLIC ARBITRATORS

It is impossible to determine exactly when the public arbitrators were first established in Athens.<sup>1</sup> Therefore, in view of their close association with the Forty, it has seemed best to treat the two institutions together, on the ground that in this way both may be represented as a sort of continuous development of the same process, so to speak, and in the belief that from this approach it may be easier to view the probabilities that are at once more likely, and open to fewer logical objections.<sup>2</sup>

#### ORIGIN OF THE FORTY

On the authority of Aristotle,<sup>3</sup> Pisistratus is said to have established certain district-judges, *κατὰ δήμους δικασταί*. Their exact number and exact powers are unknown; but it follows from Aristotle's account that Pisistratus created them in furtherance of his general policy, viz., to keep the country people busy and content on their farms and discourage their coming into Athens and taking an active part in politics. Hence the district-judges undoubtedly traveled about in the country districts, offering the farmers a ready means of settling their disputes without having to go into Athens and institute court procedure.

Furthermore, the words *καὶ αὐτὸς ἐξήκει πολλάκις εἰς τὴν χώραν ἐπισκοπῶν καὶ διαλύων τοὺς διαφερομένους* probably indicate<sup>4</sup> that the disputes Aristotle had in mind were mostly civil cases, the method of settlement chiefly arbitration. Therefore these district-judges were primarily a sort of arbitrators, like Pisistratus himself, who were authorized in certain minor civil suits to decide the issue themselves if unable to reconcile the parties beforehand.

The next reference to the district-judges comes in 26, 3, where Aristotle says: *ἔτει δὲ πέμπτῳ μετὰ ταῦτα ἐπὶ Λυσικράτους ἄρχοντος οἱ τριάκοντα δικασταὶ κατέστησαν πάλιν οἱ καλούμενοι κατὰ δήμους*. That is, in the archonship of Lysicrates, 453/2 B. C., the district-judges were restored. We do not know when they had been abolished, but

1 For a discussion of the problems involved, *vide infra*, p. 5.

2 An exhaustive treatment of the Forty is beyond the proper scope of this dissertation; all that is here stressed is their intimate connection with the public arbitrators, and the probability that the latter were developed from the arbitral functions of the Forty.

3 Aristotle, *Ath. Pol.* 16, 5. Cf. also Lipsius, *Das Attische Recht*, pp. 81-83; Thalheim in Pauly-Wissowa, Caillemier in Daremberg-Saglio, *s. v. δικασταὶ κατὰ δήμους*; Bonner-Smith, *The Administration of Justice from Homer to Aristotle*, Chicago, 1930, p. 183 f.; Wilamowitz, *Aristoteles u. Athen*, Berlin, 1893, I, p. 124 f.; Busolt, *Staatskunde*, I, p. 485; Vol. II, by Swoboda, p. 1110 f. DeSanctis in *Atthis—Storia della Repubblica Ateniese*, 2nd ed., Turin, 1912, questions the attribution of the rural judges to Pisistratus, but his arguments are not convincing. (a) The argument that they would have been called after the naucraries instead of demes carries no great weight, for *δήμους* may have the more general meaning; besides, Aristotle may simply be describing under a name familiar to his readers an institution that may well have had another name under Pisistratus; (b) likewise Cleisthenes, far from lacking any motive to abolish them, had a very good one, viz., to overthrow the autocracy that Pisistratus had secured by keeping the country people out of town; and (c) finally, the argument that they were unnecessary since the thesmothetae could have done their work is weak and cannot be taken seriously.

4 So Bonner-Smith, *loc. cit.*



presumably Cleisthenes' reforms were responsible. We learn further that their number was thirty, and they were consequently called *οἱ Τριάκοντα*.<sup>5</sup> There is no information about their functions, or what brought about their restoration at this particular time. From Aristotle's fifty-third chapter we learn that the Thirty Judges went on circuit through the demes deciding cases.<sup>6</sup> It has been ingeniously suggested that the number thirty points to a division of the body by *trittyes*, one judge for each *trittys*.<sup>7</sup>

After the time of the Thirty Tyrants the number of circuit-judges was raised to forty,<sup>8</sup> and they were thenceforward called *οἱ τετταράκοντα*, though the old appellation *κατὰ δήμους δικασταί* was still used at times.<sup>9</sup> It is commonly assumed that the increase in number was due to Athenian hatred of the Thirty Tyrants and anything associated with them, even to the number thirty. Apparently the only authority for this explanation is Pollux 8, 100, but it is unhesitatingly accepted by Lipsius and other writers. DeSanctis,<sup>10</sup> however, points out that during the Peloponnesian war the country people began to crowd into Athens to live, with the result that the necessity for the Thirty Judges to go on circuit probably began to disappear. A connection with the *trittyes* would no longer be convenient under these conditions, and by the time of Eucleides a change in the board would be opportune anyhow. Thus we find that in or shortly after 403 B. C. the number was raised to forty. Each tribe selected by lot four men to represent it,<sup>11</sup> and the sum of the members from all ten tribes made up the complete board. The district-judges had probably ceased to go on circuit by this time and held their sittings at Athens; at any rate they had an office there.<sup>12</sup>

From 453 to 403, the time during which they were known as the Thirty Judges, almost nothing is known about their functions and powers. We are justified merely in assuming that they were much the same under Pericles as under Pisistratus,<sup>13</sup> viz., that they traveled about in the country hearing more or less unimportant civil

5 If the idea expressed by *πάλιν* is to be stressed, we might conclude that the original number under Pisistratus had also been thirty; but this is highly questionable, especially if the number thirty were chosen for a division by *trittyes*, since the number of *trittyes* was only twelve before the reforms of Cleisthenes (*Ath. Pol.* 21, 3).

6 *οἱ πρότερον μὲν ἦσαν τριάκοντα καὶ κατὰ δήμους περιέοντες ἐδίκαζον*. Pollux 8, 100, Harp., Photius, Suidas, *Lex. Seg.*, s. v., give brief confused notices that are obviously garbled quotations from Aristotle.

7 Wilamowitz, *op. cit.*, II, 168, followed by later writers. The point cannot be considered established beyond doubt, for, as Wilamowitz himself admits, with the increase to forty there can no longer be a division by *trittyes*.

8 *Ath. Pol.* 53, 1. Cf. Isocr. 15, 237; Dem. 37, 33; *CIA* II, 349.

9 *Ath. Pol.* 48, 5; Dem. 24, 112.

10 *Op. cit.*, p. 342.

11 *Ath. Pol.* 53, 1. Cf. Dem. 24, 112, *κληρωτὴν ἀρχὴν ἄρξας*, said of a member of the Forty. We do not know for certain who was eligible for membership, or whether the duty was obligatory; presumably any Athenian citizen a member of the tribe in question would be eligible for the drawing. Demosthenes' further characterization of such a man as a poor man need not be taken very seriously; though no doubt the poorer citizens would be more willing to be members.

12 *Ath. Pol.* 53, 1. Aristotle is not definite, but implies that they formerly went on circuit but had ceased to do so at least by 403; so Lipsius p. 82. This view is borne out by the mention of an office belonging to them in Dem. 21, 85, where *τὸ τῶν ἀρχόντων οἶκημα* must refer to the Forty (cf. Lipsius, p. 230, n. 41).

13 Presumably Aristotle implies this, for he merely says they were reintroduced in 453 without indicating any change in their functions.



cases, in the settlement of which they probably used arbitration if possible before giving a binding decision.

After 403 we have the description of Aristotle,<sup>14</sup> which tells us much about the functions of the Forty. Unfortunately Aristotle was describing the board as it existed in his own day, and that considerable change took place between 403 and Aristotle's time is quite evident.<sup>15</sup> Nevertheless we must assume that the fundamental principles as given by Aristotle are essentially those established in 403; and that they remained the same, with certain minor changes, down to his own day.

#### ARISTOTLE'S ACCOUNT OF THE FORTY

The Forty, according to Aristotle, were selected by lot, four from each tribe; and before them—that is, before the four members of the Forty acting for the tribe of the defendant<sup>16</sup>—litigants brought *τὰς ἄλλας δίκας*, “the other suits.” This expression is rather puzzling at first, but since Aristotle has just been talking about the *εἰσαγωγεῖς* and suits of a civil nature called *ἐμμηνοὶ δίκαι* (i. e., suits that had to be completed within a month), the logical interpretation of the passage is that the Forty had jurisdiction over all suits involving rights of property, i. e., civil suits, except the *ἐμμηνοὶ δίκαι* and others belonging to the *εἰσαγωγεῖς* and the *ἀποδέκται* just previously mentioned. This is the view of Lipsius,<sup>17</sup> and, with some modification, that of Bonner<sup>18</sup> also, who concludes:

Evidently Aristotle has used *τὰς ἄλλας δίκας* loosely. All the difficulties above mentioned disappear, if we understand him to mean that all private suits not otherwise assigned in his treatise belong to the Forty and that these cases alone were subject to arbitration.

Therefore, on the authority of Aristotle, the Forty were competent for the majority of private suits involving rights of property; he does not consider it necessary to mention all the various kinds specifically, but leaves it to us to assume that any private suit is to be assigned to the jurisdiction of the Forty unless we have some particular reason to attribute it to another magistracy.<sup>19</sup>

Aristotle goes on to tell us that the Forty could settle on their own authority all cases involving less than ten drachmas.<sup>20</sup> This of course means that they were not only magistrates, who heard the complaints and prepared the case for trial, but

14 *Ath. Pol.* 53, 1 f. Cf. 48, 5; 58, 2.

15 For example, the *δίκη αἰκίας* which is mentioned by Aristotle 52, 2, as one of the monthly suits coming under the jurisdiction of the *εἰσαγωγεῖς*, seems to have belonged to the Forty at least as late as 346/5, to judge from Dem. 37, 33. Cf. Lipsius, p. 83, n. 118; p. 85.

16 Cf. *Ath. Pol.* 53, 2, *παρὰδιδάσαι (οἱ διαιτηταὶ) τοῖς τέτταρσι τοῖς τὴν φυλὴν τοῦ φερόγοντος δικάζουσιν*. Likewise 58, 2; 48, 5; and compare the similar expressions in Lysias 23, 2, and Isaeus *apud* Harp., s. v. *δρι*.

17 P. 82, n. 116.

18 “The Jurisdiction of the Athenian Arbitrators,” *Classical Philology*, Vol. II, no. 4, 1907.

19 The truth of this view is borne out by two passages in the *Ath. Pol.*, viz., 48, 5, and 58, 2, where other magistrates—in one case the *euthynus*, in the other the *polemarch*—are said to turn over to the Forty the private suits that came up first before themselves. See further on the whole question *infra*, s. v. Jurisdiction of the Arbitrators.

20 53, 2.



also judges in a limited capacity.<sup>21</sup> What happened to suits worth more than ten drachmas? This is a question that used to worry scholars before the discovery of Aristotle's treatise on the Constitution of Athens.<sup>22</sup> But it is answered once and for all by Aristotle, who tells us that the Forty handed them over to the public arbitrators;<sup>23</sup> the arbitrators heard the case and gave a decision, which could be appealed by either litigant, in which case the arbitrators sent the case back to the Forty, who thereupon took it to trial before a jury court.

The statement by Aristotle is clear and definitive; moreover, it has a still more important implication: the public arbitrators were closely connected with the Forty, and from the Forty alone did they get a summons to hear suits. There is no good evidence to show that any other magistrate could refer his cases directly to an arbitrator without the intervention of the Forty.<sup>24</sup> For example, the polemarch, in his rôle of protector of the rights of aliens, first heard all the suits involving resident aliens; but whenever they were private suits on rights of property he sent them to the Forty, who then examined them and sent them first to an arbitrator and later to a law court if necessary.<sup>25</sup> There can therefore be no doubt that the public arbitrators existed only in close connection with the Forty, and through them alone were called to act.

Should it be asked why, the explanation is not far to seek. It is probable that the public arbitrators were created to assume the arbitral functions of the Thirty Judges, now that they no longer went on circuit in the country districts.<sup>26</sup> Very likely the Thirty Judges had found arbitration extremely effective and convenient in handling disputes that came before them; hence, when the number of so-called district-judges was raised to forty in 403, a special board was created either at the same time or shortly afterwards to take over the arbitral procedure. In view of the changed and crowded condition of Athens, of the fact that the judges had now ceased to go on circuit, and of the large number of lawsuits (often no doubt trifling ones) that fell to the lot of the Forty, it is easy to see that they would be unable to handle all of them thoroughly; in particular they would be unable to oversee each case and conduct a satisfactory arbitration personally, for this was often troublesome and might require a rather long time. So a special board of arbitrators was created to relieve the Forty of their arbitral duties in most cases.

This is the only precise explanation of the origin of the public arbitrators ever offered, and if it is accepted, the problem of the date of public arbitration is

21 Cf. Isocrates 15, 237, where it appears that the Forty in their magistral capacity kept an official register, called a *σάβης*, which contained the records of the cases brought before them, and was exposed to public view for inspection. They had an office, too, if Dem. 21, 85, is interpreted correctly.

22 Caillemer, *op. cit.*

23 *Ath. Pol.* 53, 2. Cf. 53, 5.

24 Some writers, especially Lipsius, p. 227, n. 30 f., refuse to admit this. But on the authority of Aristotle, 53, 5 (quoted below, Ch. II, s. v. *Dokimasia*), it can hardly be doubted. Consequently this conclusion was reached by A. Pischinger, *De Arbitris Atheniensium Publicis*, Munich, 1893, p. 39. For some apparent exceptions to the rule and on the entire question, *vide infra*, s. v. Jurisdiction of the Arbitrators.

25 *Ath. Pol.* 58, 2; cf. the procedure of the euthynus, 48, 5.

26 This suggestion is due to Bonner, "Institution of the Athenian Arbitrators," *Classical Philology*, 11, 1916, p. 191 f. Cf. Bonner-Smith, *Administration of Justice*, I, 346 f.



automatically solved. The district-judges were increased in number and had their functions defined anew by law in 403, and accordingly the arbitrators were instituted either at the same time or shortly afterwards. There is besides no great difficulty in adopting this view, since there is no certain proof that the public arbitrators existed before 403, although some scholars hold that opinion; indeed, the supposition that they did not exist before 403 has a very strong case *prima facie*, on purely negative evidence: we find no mention of them anywhere prior to 403. And Aristotle's silence on the subject of their date, taken together with the fact that he mentions them only in connection with the Forty, seems to point in the same direction.

#### CERTAIN PROBLEMS REGARDING THE DATE OF PUBLIC ARBITRATION

1. *Lack of Evidence.*—In the Orators there is no certain mention of the public arbitrators before 403, but within a few years afterward we find them referred to in an off-hand way as if anybody would know of course what was meant. For example, Lysias, in the Diogeiton speech (Or. 32, 2), which cannot antedate 401 B. C., and may be placed somewhat later, uses a technical term that occurs only in connection with public arbitration, *μη οὔσας δῶκεν*.<sup>27</sup> This is the earliest certain mention of public arbitration in the Orators. An arbitrator is also mentioned in the 10th oration, which dates from 384/3 B. C.

Aristotle, as already pointed out, merely describes the arbitrators as they existed in his own day without giving any clear indication of when they were established; and the various lexicographers merely repeat Aristotle or each other, adding little of importance to our knowledge.

Now if public arbitration was in existence before 403, it is surprising that Aristophanes, with all his talk of the law courts, fails to mention it anywhere.<sup>28</sup> No great importance can of course be attached to the omission, since it is quite possible that failure to refer to it was merely accidental. Nevertheless the fact deserves to be noticed, and should carry some weight. Moreover, in one passage Aristophanes' language might seem to rule out the possibility of public arbitration. In the *Clouds* 1193-5 the payment of court fees is described as taking place on the day immediately preceding the trial of a case; and if this be literally interpreted, arbitration could not have intervened.<sup>29</sup>

2. *Uncertain Evidence.*—Two passages have been used by scholars in an attempt to date public arbitration neither of which can be accepted definitively be-

27 For a description of the procedure, *vide infra*, Ch. III, p. 33.

28 The word *ἐχῖνος* which occurs in the *Wasps* 1436 means simply "a jar," and need not be understood as an allusion to the special kind of urn used for filing evidence before a public arbitrator (*vide infra*). It was, however, so explained in a scholium on the passage that may be found in the Didot edition. But the scholium is of doubtful authority, since it is found in neither the Ravennas nor the Venetus MS, and is only a confused quotation of Phot. I, 240, Naber, an account of the *ἐχῖνος* as used in arbitration.

29 As Lipsius points out, p. 825, n. 77, *θέσται τῶν πρυτανείων* is identical in meaning with "Anstellung der Klage." Now unless the Prytaneia were paid after the hearing before the arbitrator, i. e., on appeal—which is unlikely, as the Forty would hardly accept a case without the fees to begin with—it follows that arbitration could not have intervened between the beginning of a suit and the trial before a jury in the time of Aristophanes' *Clouds*, 423 B. C.

cause of uncertainty about the interpretation. They are Andocides, *De Mysteriis* 87-88, and Lysias, *v. Archebiades*, Fr. XIX Teubner.

(a) In the Andocides passage a νόμος is quoted; it contains regulations in regard to lawsuits during the troubled times after the Thirty Tyrants. According to it "all the lawsuits and arbitrations are to be valid and binding, if they took place while the city was under democratic government": τὰς δὲ δίκας καὶ τὰς διαίτας κυρίας εἶναι, ὅποσαι ἐν δημοκρατουμένη τῇ πόλει ἐγένοντο. The word διαίτας, "arbitrations," in itself is ambiguous; it may refer to either private or public arbitration, and nothing in the context quite settles the matter. Hence, we cannot be sure that public arbitration is meant; *ergo*, the passage cannot be used to date public arbitration.<sup>30</sup>

(b) In the Lysias fragment, which is of uncertain date, but certainly later than 403, there is a reference to "the law about the arbitrators." The defendant, who is speaking, pleads that he has attempted to compromise the whole matter by private arbitration before mutual friends;

but though I made the challenge, my opponent would never agree to meet me or give an account of the reasons for his suit, nor would he agree to a private arbitration either, until you passed the law about the arbitrators.

The Greek runs as follows:

ταῦτ' ἐμοῦ προκαλουμένου, οὐδεπώποτ' ἠθέλησε συνελθεῖν οὐδὲ λόγον περὶ ὧν ἐνεκάλει ποιήσασθαι, οὐδὲ δίκαιαν ἐπιτρέψαι, ἕως ὑμεῖς τὸν νόμον τὸν περὶ τῶν διαιτητῶν ἔθεσθε.

Now the law referred to must be a law about public arbitrators, as the Greek words suggest at first sight; for it is incredible that any law of private arbitration that might have been passed, such as the one quoted by mistake in Dem. 21, 94, could have had any effect upon the willingness of Archebiades to arbitrate. He could have gained nothing by the passing of a law about private arbitration.

Admitting the law to be one concerned with public arbitration, how can we interpret the passage intelligibly? It amounts to saying "he would not arbitrate privately, until you passed the law about *public* arbitrators." Since public arbitration was purely a formal process that one had to go through before bringing certain types of private suits before a jury, and since the decision was not binding on either party, it is hard to see any point in this apparently meaningless contrast. It may possibly be that since public arbitration was a new thing with which the jury was not yet acquainted the speaker is trying to make a rhetorical point at the expense of the jurors' ignorance of the distinction between the two kinds of arbitration.

30 Lipsius, p. 221, n. 2, declares that public arbitration must have been meant, "at least preferably," but does not vouchsafe a reason. The ambiguity was correctly pointed out by Bonner in an article, "The Institution of the Athenian Arbitrators," *Classical Philology*, 11, 1916; cf. also Bonner-Smith, *Administration of Justice*, I, 348 f. Bonner argues that since the decision of a public arbitrator was always subject to appeal anyhow, the passage has more point if we understand the law as designed to validate private arbitral agreements. However, there is a chance that litigants who had agreed to abide by the decision of a public arbitrator might afterwards take advantage of the disturbances under and after the Thirty, in order to reopen the decision. Therefore public arbitration cannot be ruled out altogether; but the possibility of it is assuredly made more remote.



However, if the passage means anything at all as it stands in its fragmentary state, it may be interpreted as follows: Archebiades was unwilling to arbitrate before mutual friends and talk things over, because he wished to take advantage of his young opponent before the jury, chiefly by keeping his arguments secret before the trial and taking him by surprise; however, when the law about public arbitration was passed, compelling litigants in civil cases to go through hearings before an arbitrator as a preliminary to the jury trial, Archebiades was forced to go before an arbitrator willy-nilly. Since all evidence used in the actual trial had to be presented first before the arbitrator, the ultimate effect was that Archebiades was forced to reveal his case, λόγον περὶ ὧν ἐνεκάλει ποιήσασθαι. This interpretation, while admittedly rather strained, gives tolerable sense to an otherwise meaningless passage.

If this view of the Lysias passage is accepted, there is no difficulty in understanding the reference to a law that established the board of public arbitrators and made it compulsory for certain private suits to be heard by them before coming before a jury; and the date of the law would remain unknown, but presumably later than 403. If the wording of the title of the law is correctly given by Lysias, it follows that the law instituting the arbitrators was not identical with, or included in, the one concerning the Forty;<sup>31</sup> it was probably passed either immediately, or soon, after the law regulating the number and powers of the district-judges.<sup>32</sup>

(c) In addition to the mention in the Lysias fragment and the remarks of Aristotle on the powers of the Forty, that there was such a law making public arbitration compulsory for the majority of civil cases is also indicated by a notice in the *Lex. Cantabr.*, p. 673, s. v. μὴ οὔσα δίκη: ἔδει γὰρ τοὺς ὑπὲρ δέκα δραχμὰς ἀμφισβητούντας διαιτητὰς εἰς δίκην ἐκάστην λαμβάνειν διὸ καὶ ἔκειτο νόμος μὴ εἰσάγεσθαι δίκην εἰ μὴ πρότερον ἐξετασθεῖη παρ' αὐτοῖς τὸ πρᾶγμα. This agrees with Aristotle,<sup>33</sup> and there is no reason to doubt this part of the account, as Lipsius shows, p. 220, n. 2. There is, however, unfortunately no indication of the date of the law;<sup>34</sup> there does not seem to be any good reason not to assume that the law referred to is the same as that mentioned in the Lysias fragment soon after 403.

#### RÉSUMÉ

In the foregoing pages an effort has been made to demonstrate that the public arbitrators probably developed from the arbitral functions of the district-judges; that the latter were regulated by law as the board of magistrates called the Forty in,

31 So Bonner-Smith, *op. cit.*, p. 351 f.

32 That is, after 403, but before 400, the date of the first mention of public arbitration (Lysias 32, 2).

33 Cf. also Pollux 8, 126, who, however, makes the mistake of including all private suits in the rule: πάλαι δ' οὐδεμία δίκη πρὶν ἐπὶ διαιτητὰς ἐλθεῖν εἰσάγετο.

34 Lipsius and others (p. 220) would date the law requiring compulsory arbitration for most private suits in 403, and agree in identifying it with the law mentioned in the Lysias fragment. They however seem to think that public arbitration existed before in some degree; it was only regulated afresh and made compulsory in 403. Pischinger (p. 49) accepts this view. In what shape it existed prior to 403, however, they do not make clear. Now if it did exist prior to 403, it could have been only as a part of the duties of the thirty district-judges; certainly we cannot think of a board of arbitrators. The only reason for thinking public arbitration prior to 403 is the Andocides passage, which has been shown above to be useless as evidence.

or shortly after, 403 B. C.; that sometime not long afterwards the public arbitrators were instituted, and a law was passed making arbitration compulsory for most civil suits; and that whereas the exact date of public arbitration is impossible to determine, there is no good reason to believe it antedated 403, but a very good reason to place the establishment between 403 and 400. So much for the origin and date of public arbitration; before passing on to a description of the board and the manner of conducting the arbitrations, it remains only to inquire what its real function was, and how long it continued at Athens.

#### FUNCTION OF PUBLIC ARBITRATION

The practical purpose of public arbitration is suggested by the fact that there was a law requiring all suits of a certain type to be heard by an arbitrator before coming to trial before a jury. We at once ask, why such insistence on the procedure? Was it merely for the benefit of the litigants concerned? Now it is true that going before an arbitrator furnished a ready, informal, convenient, and cheaper way of settling disputes than going before a jury court;<sup>35</sup> however, it is unlikely that a law would actually force a man to resort to arbitration if he preferred a jury trial, as indeed the right of appeal from the decision of a public arbitrator quite obviously demonstrates. No, the real purpose was much more practical than that. At the end of the fifth century the Attic law courts began to be very crowded, and in view of the large number of jurors that had to be paid, together with the usual elaborate legal machinery, something had to be done to cut down the number of lawsuits requiring juries. Public arbitration was the extremely clever expedient adopted for this purpose. Since the great majority of private suits came up before the Forty, it was most logical to apply the principle there. The Forty themselves decided petty suits of less than ten drachmas, thus keeping them out of court. All suits of higher value they sent first to a public arbitrator, who attempted to reconcile the parties but gave a decision subject to appeal when reconciliation failed. Doubtless some litigants abided by the decision of the arbitrator, and thus the case would end without the expense of a jury trial. But even if an appeal was taken, a great reduction was secured in time required for trial, and in troublesome and costly procedure, by a rule requiring that all the evidence used in the actual trial had to be presented first before the arbitrator, then written down, and, in case of appeal, used later in court;<sup>36</sup> no new evidence could be presented that had not been heard and filed by the arbitrator. And the arbitrators themselves, as Wilamowitz observes, were secured without cost to the state, by merely assigning all men to the board of arbitrators who were in their last year of military duty; the only pay they got was the small fee given them by the litigants, called the *παράστασις*.<sup>37</sup>

35 On these points, *vide infra*, Ch. III, p. 22.

36 For a more detailed discussion of these points, *vide infra*, Ch. III, p. 27. On the practical purpose of public arbitration cf. Lipsius, p. 220, n. 2; Wilamowitz, *op. cit.*, I, 224 ff.; Swoboda in part 3 of K. F. Hermann's *Lehrbuch der Griech. Staatsaltertümer*, 6th ed., Tübingen, 1913, p. 156.

37 On this fee, *vide infra*, Ch. III, p. 22.



## DURATION OF PUBLIC ARBITRATION

How long did such an interesting and original invention of the Athenians remain in use, and was it successful? We can answer neither of these questions with certainty. In the main, it is probable that public arbitration was fairly successful in accomplishing what it set out to do; there are indications that litigants sometimes accepted the decision of the arbitrator,<sup>38</sup> thus bringing an end to the litigation without further expense and trouble either to themselves or the state. But on the other hand it undoubtedly not only often failed to reconcile the litigants, but even gave them a fresh field in which to exercise the genius of their litigious tempers and rhetorical tongues; certainly in some cases arbitration seemed rather to complicate matters than simplify them, since the arbitrator had little authority over the litigants, who could always appeal from his decision without any prejudice to their case before the jury. Many delays in the procedure could be devised by a wily opponent, especially by exercise of the right to ἀντιλαγχάνειν τὴν μὴ οὔσαν<sup>39</sup> (v. p. 33), that is, to apply for an annulment of an arbitrator's decision given in default. Therefore, the question of the efficacy of public arbitration must remain an open one. Whatever opinion one may hold on that point, however, it is at least highly probable that the institution passed into the discard along with many others in or shortly after 32/32 B.C., upon the change in the Athenian constitution. The new conditions of citizenship, attended by the emptying of the jury courts, must have meant the end of much legal machinery at the same time, and it is improbable that the public arbitrators escaped. Moreover, with the body of citizens limited to about 9,000 men only, many difficulties would arise in finding a sufficient number of men eligible for election by lot to the many offices and magistracies filled by that method; some change was therefore inevitable.<sup>40</sup> In support of this view it appears that there is no mention of public arbitration at Athens subsequent to 322, and there is consequently little reason to assume that it continued to exist after that date.

38 *Vide infra*, Ch. III, p. 34.

39 Demetrius of Phalerum seems to have objected to this procedure of public arbitration, to judge by *Lex. Cantabr.* s. v. μὴ οὔσα δίκη: Δημήτριος ὁ Φαληρεὺς ἐνίοις λέγει τῶν κρινόμενων κακοτεχνεῖν τοῖς δῶκουσιν ἀντιλαγχάνοντας τὴν μὴ οὔσαν κτλ. Cf. Wilamowitz, *op. cit.*, I, 224; Thalheim in Pauly-Wissowa s. v. *διαίτησις*; Lipsius, p. 229, n. 39. Lipsius merely comments that the account in the *Lex. Cantabr.* proves that arbitration had not been abolished in 323 but was still in force in the time of Demetrius, and declares (p. 233) that we cannot know how long the institution continued. However, since he objected to it, it seems probable that in his capacity of reviser of the laws he abolished it himself if it did still exist at the period of his control. Even if his reported objection proves that it still was in force under his régime, which is open to question, there is still no reason to assume that it survived him; the date of abolition would be simply postponed a few years.

40 Cf. Ferguson, *Hellenistic Athens*, pp. 22, 25.

## CHAPTER II

THE BOARD OF PUBLIC ARBITRATORS;  
ARISTOTLE'S ACCOUNT

Aristotle<sup>1</sup> tells us that all Athenian citizens in their sixtieth year were public arbitrators: *διαιτηταὶ δ' εἰσὶν οἷς ἂν ἐξηκοστὸν ἔτος ᾗ*. He further demonstrates the truth of this statement by describing the muster-rolls of the hoplites.<sup>2</sup> A man was subject to military duty for forty-two years in all, beginning from the time when he reached eighteen and was enrolled with the ephebes, until he became sixty years of age. The ephebes were enrolled each year on a list which contained both the name of the archon eponymous, who gave his name to the year, and also the name of an eponymous hero who was the *ἐπώνυμος τῆς ἡλικίας*, that is, a sort of patron saint, as it were, for all the young men of the same age in that particular year. Thus there were forty-two groups of men in military service, each having an eponymous hero; such an eponym was very convenient as a means of referring to any particular age-group, summoning it for duty, and dating the year of service. The archon eponymous would not serve the purpose, for there was of course a new one every year; but the ephebes kept their eponymous hero unchanged until they reached sixty. The cycle of forty-two eponymous heroes was, moreover, unending; for each fresh group of ephebes took over the eponymous hero that had belonged to those who had been sixty years old in the previous year and had therefore concluded their term of military service. Now the Forty, says Aristotle, simply take over the list of men headed by the last of the eponymous heroes, the forty-second in the cycle,<sup>3</sup> and use these men as a panel from which to select public arbitrators by lot; hence, as Aristotle reasons, it is clear that the public arbitrators consist of all citizens who are in their sixtieth year.

Aristotle's brief account of the board of arbitrators, valuable as it is, regrettably leaves certain questions unanswered. It must be noted in particular that his description applies only to the board as it existed in his own day, at the time when his

1 *Ath. Pol.* 53, 4. Before the discovery of Aristotle's treatise this was known (but imperfectly) from Bekker's *Anecd.*, 235 (Schol. Plat. *Leg.* 920 D); Pollux 8, 126; Hesychius s. v. *διαίτα*; *Etym. Magnum* (Gaisford) s. v. *διαιτητα*; Greg. Cor. in Walz, *Rhet. Gr.* VII (2), 1284; *Lex. Patm.* p. 13. The age of fifty is erroneously given by Suidas s. v. *διαιτητάς*, Bekker *Anecd.*, 186, and Schol. ad Dem. *Mid.* (21), sec. 83.

2 For these military lists see Kenyon's ed. of the *Ath. Pol.* and Sandys' 1912 ed. *ad loc.*

3 The arbitrators correspond to the forty-second or final list, as Wilamowitz points out (*op. cit.*, I, 224, n. 77), not to those who had already completed their forty-two years of service, as might be supposed. Thus men were exempted from the forty-second year of military duty and served instead as arbitrators. Furthermore it seems clear that by Aristotle's rather ambiguous phrase *οἷς ἂν ἐξηκοστὸν ἔτος ᾗ* we must understand all who had passed their fifty-ninth birthday but not yet the sixtieth at the first of the year when the lists were made out. So Sandys in his note on the passage, 1912 ed., p. 205; Wilamowitz, *loc. cit.*, errs slightly in thinking that the forty-second list would be composed of men who had completed their sixtieth year: "die 60 jahre vollendet haben." This follows from the manner in which the ephebic lists were made out, if the ephebes were all who had passed their eighteenth birthday before the list was made out, as is generally assumed to be the case (cf. C. A. Forbes, *Greek Physical Education*, New York, 1929, Ch. VI, p. 127; Lipsius, p. 226, n. 24).



treatise was published, 328-5 B. C. It cannot be accepted as completely true, of course, for the first board of arbitrators shortly after 403 and thereafter down to Aristotle's time. In the first place it is usually assumed that the ephebia described by Aristotle began only as late as 335/4,<sup>4</sup> and that the forty-two tables date from 346, the year of the *διαψήφισις*, at the very earliest. But is it not obvious that when Aristotle was writing the treatise in 328 the arbitrators were taken from a muster-roll that began forty-two years earlier with the ephebes of 370 B. C.? If so, and if the word *ἐφηβοί* of 53, 4, is used in the later technical sense, it is rather surprising that Aristotle gives no inkling of how the arbitrators were procured before the introduction of the ephebia, as the public arbitrators go back at least to 384/3, the date of Lysias X, probably to 403.<sup>5</sup> As far as Aristotle's account goes, we have no authority for thinking that the arbitrators were ever procured in any other way than by simply taking the last of the forty-two tables, containing the names of the men who had been ephebes forty-two years before. Therefore we must choose one of two alternatives: either the ephebia is older than 335, or else Aristotle has passed over in silence some change in the machinery he describes, as indeed he only too often does. It is probably simpler to choose the latter. Immediately there occurs the idea, that the forty-two tables were an ancient arrangement, to which the additional refinement of the ephebia was added much later, perhaps sometime after the *διαψήφισις* of 346;<sup>6</sup> and that the arbitrators had always been taken from the last of the forty-two tables, and were consequently men in their sixtieth year, i. e., past fifty-nine, from the very beginning.

#### THETES

Another interesting question not answered by Aristotle is whether the fourth Solonian class, the Thetes, were included on the military lists and would consequently be eligible for the board of arbitrators in their sixtieth year. No definite solution must be expected here, since scholars disagree and evidence is insufficient. In spite of the fact that Aristotle says nothing to indicate that Thetes were not on the muster-rolls of the hoplites,<sup>7</sup> his silence may just as well be argued in the other direction; and the arguments of Gilbert<sup>8</sup> and Sundwall<sup>9</sup> are very strong against including them. On the whole we may incline to the view that Thetes did not regularly serve as hop-

4 Cf. Forbes, *op. cit.*, p. 113 f., who follows Wilamowitz, *op. cit.*, I, 191 f., and Busolt-Swoboda, p. 1112, n. 1, where it is declared that there was no catalogue of all those subject to military duty before the institution of the ephebes.

5 *Vide supra*, Ch. I, p. 4.

6 This might be vaguely inferred from 53, 4, where Aristotle says that the ephebes were formerly enrolled upon wooden tablets, but in his day a bronze stele was used. If the treatise was written shortly after 328, we can hardly believe that his description of what formerly was true refers to a change coming between 335 and 328, all too short a time. But if we suppose the change from wood to bronze came in when the ephebia was introduced, all seems natural enough. Aristotle would naturally have the ephebia uppermost in mind, as the latest and most important innovation in the years of military service, and would therefore describe the entire arrangement from that point of view.

7 This is the argument of J. Beloch, *Griechische Aufgebote*, I, *Klio*, V, 1905, in favor of including the Thetes. He is followed by Forbes, *op. cit.*, p. 128.

8 *Handb. d. Gr. Staatsalterthümer*, I, 2, p. 353, Anm. 1; Eng. tr. p. 315, n. 3.

9 J. Sundwall, *Epigraphische Beiträge zur sozial-politischen Geschichte Athens im Zeitalter des Demosthenes*, *Klio*, Ergänzungsband I, 1906, Beiheft 4, p. 32. Sundwall attempts, with

lites, and were therefore not included in the list of ephebes drawn up each year for the purpose of completing the forty-two tables of military service; hence, *a priori*, they were not members of the forty-second list containing the names of the arbitrators. The remark of Demosthenes in Or. 21 (*Midias*), 83, to the effect that the arbitrator Straton was a poor man, ἄνθρωπος πένης μὲν τις καὶ ἀπράγμων, is too vague to be used as an argument to the contrary; his moderate circumstances are merely employed rhetorically by Demosthenes as a foil to the overweening wealth of *Midias*.

If we are correct in excluding Thetes from the board of public arbitrators, then the statement of Aristotle that any citizen was an arbitrator in his sixtieth year, must be amended as follows: any citizen of sufficient wealth to belong to one of the three upper classes was on the board of arbitrators in his sixtieth year.<sup>10</sup>

#### DOKIMASIA

Aristotle mentions no *dokimasia* for the arbitrators. He says simply (ch. 53, 5): τὸν δὲ τελευταῖον τῶν ἐπωνύμων λαβόντες οἱ τετταράκοντα διανέμουσιν αὐτοῖς τὰς διαίτας καὶ ἐπικληροῦσιν ἅς ἕκαστος διαιτήσῃ. That is, the Forty select by lot for each case an arbitrator from the names on the last or forty-second of the forty-two tables. Now during the forty-one years that had elapsed since the arbitrators were first entered on the muster-roll at eighteen, many of the men on the list had doubtless died, gone into exile, or been disfranchised, unless we assume a yearly revision of the forty-two tables, for which there is no evidence. So the Forty would be forced to revise the muster-roll in some way; this would be all the more necessary since some were exempt from serving as arbitrators, as Aristotle tells us.<sup>11</sup> Therefore it appears extremely likely that at the beginning of every year the Forty made out an official list of arbitrators from the names on the muster-roll, including only those actually qualified to act as arbitrators.<sup>12</sup> The official revision by the Forty would be sufficient for all purposes, and renders it unnecessary to think of a regular δοκιμασία,<sup>13</sup> as does Pischinger.<sup>14</sup> Hence the remarks of Suidas and the scholiast on Dem. 21, 83, implying that the arbitrators had to be men with a clean record, καθαρὸς πάσης αἰτίας ὑπείλημμένους, need not be taken very seriously. Neither was there any εἶθυνα for the arbitrators, as any complaint against them could be brought before the entire board of arbitrators for the year meeting in full session.<sup>15</sup>

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fair measure of success, to demonstrate his conclusions by an industrious examination of inscriptions: every name found he tries to identify as that of a rich or a poor man. He thinks that the names of undoubtedly wealthy men occur too often to allow the presence of the great mass of poorer citizens in the hoplite ranks and in various offices that required the hoplite census. In regard to arbitration he also points out that it was a laborious procedure which would probably not have appealed to the poorer citizens because of the small remuneration, the παράστασις (*q. v.*).

<sup>10</sup> So Sundwall, *op. cit.*, p. 34.

<sup>11</sup> Ch. 53, 5; a man has to serve as arbitrator if of the proper age, unless holding another office or away at the time. The names of those out of town might, of course, appear on the list, and the exemption might be pleaded later when a case fell to the man in question by lot; but at least the names of those holding another office were probably struck off the list.

<sup>12</sup> So Bonner-Smith, *op. cit.*, p. 346 f.

<sup>13</sup> So Lipsius, p. 226, n. 25.

<sup>14</sup> Pischinger, *op. cit.*, p. 11.

<sup>15</sup> For this εἰσαγγελία εἰς τοὺς διαιτητάς, *vide infra*, p. 15. The only mention of an εἶθυνα in an ancient source is that of Ulpian on Dem. *Midias*, 21, 86; cf. Pischinger, p. 25. But the *Midias* passage has to do with an εἰσαγγελία εἰς τοὺς διαιτητάς as mentioned by Aristotle, not with an εἶθυνα. *Vide infra*, p. 16.



## DIVISIONS OF THE BOARD

The words of Aristotle quoted above, *διανέμουνσιν αὐτοῖς τὰς διαίτας*, might seem to imply a different procedure from the actual drawing lots to select an arbitrator for a particular case, *καὶ ἐπικληροῦσιν ἅς ἕκαστος διαιτῇσει*.<sup>16</sup> Furthermore, we read in Dem. 47, 12, that the arbitrators hearing cases brought against members of the tribes Oeneis and Erechtheis sat regularly in the Heliaia. It is therefore probable that when the official list of arbitrators for the year was made out by the Forty all the arbitrators were divided into ten groups, and each group assigned to one of the ten tribes.<sup>17</sup> An official building was assigned to each group for the arbitral hearings; it was usually some temple or public building, like the Heliaia above mentioned, the Painted Portico of Dem. 45, 17, or the Delphinium of Dem. 40, 11. In making up the ten groups no attention was paid to tribal affiliation; it was perhaps done by lot in order to make an even distribution.<sup>18</sup> Such an arrangement would expedite matters for the Forty as well; when a case was entered before the four of the Forty acting for the tribe of the defendant, they could select an arbitrator to hear the case by lot from the group of arbitrators acting for the tribe in question more easily than from the entire body of arbitrators. Each section of the Forty would then have an intimate connection with its own panel of arbitrators, whom they could easily reach and supervise in their duties.

## OBLIGATION TO ACT AS ARBITRATOR

Aristotle further tells us that a man of the proper age to be an arbitrator was compelled by law to complete the arbitrations assigned to him by lot, unless he happened to be holding another office or traveling abroad; the penalty for failure to do so was loss of civil rights, *ἀτιμία*.

*καὶ ἀναγκαῖον ἅς ἂν ἕκαστος λάχῃ διαίτας ἐκδιαιτᾶν. ὁ γὰρ νόμος, ἂν τις μὴ γένηται διαιτητῆς τῆς ἡλικίας αὐτῷ καθηκούσης, ἀτιμον εἶναι κελεύει, πλὴν ἔαν τύχῃ ἀρχὴν ἄρχων τινὰ ἐν ἐκείνῳ τῷ ἑνιαυτῷ ἢ ἀποδημῶν: οὗτοι δ' ἀτελεῖς εἰσὶ μόνοι.*<sup>19</sup>

16 Cf. Lipsius, p. 227, n. 29; Goodell, "Aristotle on the Public Arbitrators," *Am. Journal of Philology*, XII, 1891, p. 322. Bonner-Smith, however, *op. cit.*, 347, prefer to understand by the two phrases merely two aspects of the same act, i. e., the act, and the manner in which it was carried out.

17 Cf. Lipsius, p. 227, n. 28; Bonner-Smith, p. 346. Compare the similar divisions of the Forty, the senate, and other bodies.

18 That there was no connection between the tribe of the arbitrator and that of the plaintiff or the defendant is proved by Dem. 21, 68 and 83, where it appears that Straton of the tribe Aiantis was arbitrator in a suit brought by Demosthenes of Pandionis against Midias of Erechtheis. Cf. B. Hubert, *De Arbitris Atticis et Privatis et Publicis*, Leipzig, 1885. As Bonner and Smith point out, *loc. cit.*, the representatives from various tribes on the board would vary greatly in number. For instance in *CIA* II, 943, the members of different tribes on the board range from three to sixteen. "The natural thing to do under these circumstances was to distribute the arbitrators as evenly as possible into ten sections without regard to their tribes." It is impossible to determine whether in forming the ten groups care was taken to avoid placing a member of the tribe in the group acting for his own tribe; there was probably no need to go so far, in view of the small authority the arbitrators had, and of the fact that one might always appeal from their decision if one suspected prejudice. This division by lot into ten groups may possibly be what Pollux (8, 126) means when he says *Διαιτῆται δὲ ἐκ τῶν ὑπὲρ ἐξήκοντα ἔτη γεγονότων ἐκκληροῦντο καὶ ἐπεκληροῦντο αὐτοῖς αἱ διαίται*.

19 Ch. 53, 5. Cf. Pollux 8, 126: *ἐπεκληροῦντο αὐτοῖς αἱ διαίται, καὶ ἀτιμία ἀφώριστο τῷ μὴ διαιτῆσαντι τὴν ἐπικληρωθεῖσαν διαίταν*; Greg. Cor. (Walz, *Rhet. Gr.* VII (2), 1284): *ὅς δ' ἂν αὐτῶν λαχὼν μὴ ἐκδιαιτῇ, ἀτιμος κατὰ νόμον ἐγένετο*.

It is not certain which kind of ἀτιμία is meant, whether complete or partial; but probably the severer form is meant.<sup>20</sup> We are not told who would bring such a complaint against an arbitrator, or by whose decision he would suffer loss of civil rights. Would it be left to the parties to complain before the entire college of arbitrators, εἰσαγγέλλειν εἰς τοὺς διαιτητάς, as in the case where a litigant thought himself wronged by an arbitrator?<sup>21</sup> Or would the refusal be punished on the authority of the Forty alone? Would the Forty appeal to the college for a condemnation? No certain answer can be given to these questions, but on the basis of Aristotle's remarks on the εἰσαγγελία εἰς τοὺς διαιτητάς it is probable that it would be left to the litigants themselves, possibly supported by the Forty, to complain before the college if an arbitrator refused to decide their cause; for Aristotle uses the word καὶ as if he meant to imply that one may *also* complain to the college about an arbitrator's unfairness, *as well as* about his refusing to act as arbitrator.<sup>22</sup> The facts would have to be established in some way; and it is doubtful whether the Forty had power to penalize the offender with ἀτιμία on their own authority.

The law that Aristotle had in mind here was obviously a particular law passed for the purpose of forcing all the arbitrators to undertake and complete the arbitrations assigned to them by lot. We know nothing else about it. Possibly it was simply a part of the law making arbitration compulsory for certain private suits that was mentioned by the *Lexicon Cantabrigiense* and discussed above. If not, a guess as to its date would place it preferably as far back in the direction of 403 as possible; for both these laws are really correlates of the initial law establishing public arbitration, whatever it was, and were designed to enforce it. As already pointed out, the real motive for the institution of public arbitration was to relieve the Athenian courts of their great burden; hence soon after the law establishing public arbitration there would naturally be passed a law making it compulsory for certain suits, and a law forcing the arbitrators to undertake the arbitrations. Since there was no pay for the arbitrators except the purely nominal fee called the παράστασις, and since the duty was an arduous one involving not only time and trouble but also the risk of becoming embroiled with the litigants, it is only natural to suppose some men would attempt to avoid being arbitrators. Hence a law would be needed to force compliance from unwilling members of the board.

The law provided that an arbitrator must not only undertake the case, but also complete it, ἐκδιαιτᾶν, i. e., render an arbitral decision. The decision was open to appeal, of course, but always had to be given; an arbitrator could not refuse to give

20 So Sandys *ad loc.* In Dem. 21, 87, Straton was obviously under complete ἀτιμία: ἀπάντων ἀπεστέρηται τῶν ἐν τῇ πόλει καὶ καθάπαξ ἄμιμος γέγονεν. He had been condemned by the εἰσαγγελία εἰς τοὺς διαιτητάς of course, brought by Midias for what he, Midias, claimed was unfair treatment in his handling of the arbitration. Though this is obviously not the same as a refusal to act as arbitrator, the presumption nevertheless is that the kind of ἀτιμία would be the same in both cases.

21 For this procedure, *vide infra*, p. 15.

22 Ch. 53, 6: ἔστιν δὲ καὶ εἰσαγγέλλειν κτλ. Of course it could be argued on the other hand that καὶ implies a contrast, a different act altogether. But Aristotle's use of οἱ νόμοι in 53, 6, implies he was thinking of both the law in regard to the duty of being an arbitrator and also that regarding the εἰσαγγελία in close connection. They may even have been passed together.



an award merely because he felt reluctant to pronounce judgment,<sup>23</sup> or for any other reason. The *raison d'être* of the provision is obvious; without it, an unwilling arbitrator could accept a case under compulsion and then proceed to ignore it.

Since an arbitrator's tenure of office was obviously one year only,<sup>24</sup> after which the next group of men sixty years of age would assume his duties, it is tempting to suppose that the law Aristotle mentions also required the arbitrator to complete his cases within the year. A study of passages in the Orators produces no evidence against the probability of this view, for, though we read of proceedings before an arbitrator protracted to considerable length, we can never be sure they exceeded a year. One passage in Isaeus, it is true, has been falsely interpreted by some scholars to mean that an arbitrator held a case for two years.<sup>25</sup> The expression used by Isaeus, *δύο ἔτη τοῦ διαιτητοῦ τὴν δαίταν ἔχοντος*, is inexact, perhaps wilfully misleading; for there were two arbitrators involved in the case, which had gone by default and had then been reopened by the procedure known as *ἀντίληξις τῆς μὴ οὔσης*. The phrase should therefore be taken to mean 'although the case has been *in arbitration* for two years'.<sup>26</sup> But suppose a case came up very late in the year? This question is admirably answered by Wyse, *Isaeus*, p. 722:

If it be asked what happened if a suit was allotted to an arbitrator so late in the year that it could not be completed in the prescribed time, the answer is that we do not know that the contingency was allowed to arise. If however a litigant would not or could not appear, the arbitrator had a means of self-defense; he could fix a day for the final decision, pronounce against the defaulter *in contumaciam*, and leave him to upset the award by the procedure of *ἀντίληξις τῆς μὴ οὔσης*.<sup>27</sup>

#### Εἰσαγγελία εἰς τοὺς Διαιτητάς

Aristotle informs us that if anyone were wronged by an arbitrator he could bring an impeachment before the college of arbitrators, and if the offending arbitrator were found guilty by the college, the law prescribed *ἀτιμία* as a penalty, an appeal to a law court being, however, allowed against the decision. Ch. 53, 6: *ἔστιν δὲ καὶ εἰσαγγέλλειν εἰς τοὺς διαιτητάς, ἂν τις ἀδικηθῇ ὑπὸ τοῦ διαιτητοῦ, κἄν τινος καταγνώσιν*,

23 Hence the arbitrator Theodotus in Dem. 34, 21, who refused to give a decision but sent the litigants away to the law court, must be regarded as a private arbitrator, not public.

24 Cf. Dem. 21, 86, *φυλάξας τὴν τελευταίαν ἡμέραν τῶν διαιτητῶν*, which implies the end of a yearly tenure of office, as Hudtwalcker noticed, *Ueber die Öffentlichen und Privatschiedsrichter—Diäteten—in Athen*, Jena, 1812, p. 6.

25 Isaeus XII, 11. See the notes of Wyse on the passage. Hubert, p. 46, in order to get around the difficulty, accepted a theory proposed by Schoemann (*Comm. on Isaeus*, p. 481), that the arbitrator hearing the suit was reappointed for another year. But this theory does not fit the Isaeus passage, where there were obviously two arbitrators; is unlikely on the face of it; and finds no support in Aristotle's account of the arbitrators, or elsewhere.

26 Wyse, *ad loc.* The difficulty was first noted by Hudtwalcker, who proposed (p. 7) the emendation *τῶν διαιτητῶν* for *τοῦ διαιτητοῦ*. The emendation is, however, unnecessary, and even a bit misleading, as Wyse demonstrates.

27 One need only add that if a case were entered very late in the year, the Forty themselves would probably refuse to accept it, advising the plaintiff to postpone action until the new magistrates should enter upon their offices. Compare the situation described in Antiphon VI, 42, where the king archon refused to accept a murder case because he would have been out of office before time to bring the case to trial.

ἀτιμοῦσθαι κελεύουσιν οἱ νόμοι : ἔφεσις δ' ἔστι καὶ τοιούτοις.<sup>28</sup> The statement of Aristotle implies a regular meeting of the entire board of arbitrators as a college, for the purpose of hearing such complaints.<sup>29</sup> It was formerly thought that the impeachment was perhaps brought before a heliastic court instead of the college of arbitrators, as Harpocration<sup>30</sup> has an erroneous notice to that effect; but the text of Aristotle is decisive against the mistaken view. The law referred to was probably passed along with the one discussed above which compelled the arbitrators to undertake the arbitrations, or both may have been simply two parts of the general regulations about arbitration; at any rate Aristotle seems to think of them in common. In an impeachment there can be no doubt about the kind of ἀτιμία involved; the case of Straton in *Dem. v. Midias* settles it as complete ἀτιμία.<sup>31</sup> This passage is also the chief source of our knowledge of the procedure. What were the grounds of complaint against an arbitrator? Since one could always appeal from the decision without prejudice to the hearing of the case before a heliastic court, it may seem strange that there should have been any occasion for such measures. However, we must remember that the chief aim of public arbitration was to keep litigation out of the courts, and the only way this could be successfully accomplished was to ensure that the arbitrations should be just and fair; otherwise no litigant would ever abide by the decision, but would always appeal to a court. Hence a check on the arbitrators was devised in the shape of an impeachment.

#### THE CASE OF STRATON

In his speech against Midias,<sup>32</sup> Demosthenes tells the story of what happened to Straton, an arbitrator who had heard a case (δίκη κακηγορίας) brought by Demosthenes against Midias, and had given a decision against Midias by default. Although the passage must be used with caution in view of the deceptive tactics of the orator in stating a bad case, it is nevertheless the only case on record of the impeachment of an arbitrator, and is therefore of great value. The proceedings are difficult to follow with precision, for, as the scholiast very properly remarks,<sup>33</sup> Demosthenes is trying to give his side of a bad case and forestall the use of it against him by the

28 Cf. Bekker, *Anecd.*, 235, 24 (Schol. Plat. *Leg.* 520 D and *Lex. Dem. Patm.* p. 13): τὸν δὲ ἀδικούντα διαιτητὴν ἐξὴν εἰσαγγέλλειν, καὶ εἰ τις ἐάλω, ἀτιμία ἦν τὸ ἐπιτίμιον.

29 For the college of arbitrators, *vide infra*, p. 18.

30 Harp. s. v. εἰσαγγελία . . . ἄλλη δὲ εἰσαγγελία ἐστὶ κατὰ τῶν διαιτητῶν· εἰ γὰρ τις ὑπὸ διαιτητοῦ ἀδικηθῇ, ἐξὴν τοῦτον εἰσαγγέλλειν πρὸς τοὺς δικαστάς καὶ ἀλοὺς ἡτιμοῦτο.

31 *Dem.* 21, 87: ἀπάντων ἀπεστέρηται τῶν ἐν τῇ πόλει καὶ καθάπαξ ἄτιμος γέγονεν. Goodell, *op. cit.*, p. 322, misunderstood the phrase καθάπαξ ἄτιμος γέγονεν as a contradiction of Aristotle's admission of an appeal against the decision of the college, probably taking it to mean "has been condemned to ἀτιμία once and for all," whereas it means merely "has been reduced to complete ἀτιμία." Furthermore the words of Demosthenes addressed to the jury in 91, καὶ τοῦτ' ἐχαρίσασθ' αὐτῷ, prove that an appeal was taken by Straton but denied by the jury, who upheld the college in favor of Midias; cf. Fränkel, *Att. Geschworenenger.*, p. 73, Lipsius, p. 232, n. 46. Goodell tried to explain the supposed disagreement between Demosthenes and Aristotle by assuming a change in the law; needlessly, since there is no real disagreement.

32 *Dem.* 21, 81-101. See the notes on the passage by W. W. Goodwin, *Demosthenes Against Midias*, Cambridge, 1906.

33 Ulpian on 21, 83: Σαθρόν ἐστιν ὅλον τὸ περὶ τὸν Στράτωνα μέρος τῷ Δημοσθένει κτλ. The overwhelming evidence in favor of this interpretation and against the account of Demosthenes is that not only did the college of arbitrators condemn Straton, but their decision was also upheld by a law court. There must surely have been some grounds of complaint against him.



opposition; but the facts are substantially as follows: Soon after 364 B. C., Demosthenes brought a *δίκη κακηγορίας* against Midias for his insolent language to Demosthenes and members of his family. This suit came under the Forty, and a public arbitrator was selected to hear it, a man named Straton. Midias took certain legal steps<sup>34</sup> to postpone the arbitral decision; Demosthenes insinuates they were pettifoggish tricks, but it is probable that Midias had at least some semblance of legal rights in the matter.<sup>35</sup> However that may be, the decision was given against Midias *in contumaciam*.<sup>36</sup> Midias now took the only course open against the decision, viz., to enter a plea to have the decision in default set aside, by alleging some excuse for the failure to appear, *ἀντιλαχέιν τὴν μὴ οὔσαν*. To do this it was necessary to swear an oath asseverating the justice of his cause (*διωμοσία*). Midias neglected to take the oath, and the decision of Straton given in default thus became binding. Demosthenes declares that Midias deliberately neglected the oath in order to put Straton off his guard and give the impression of acquiescing in the decision.<sup>37</sup> At any rate, we are told that Midias waited for the "last day of the arbitrators,"<sup>38</sup> in order to surprise Straton, and then suddenly appeared before the college of arbitrators late in the afternoon in Straton's absence and bribed the chairman to put the vote about Straton illegally, without registering a witness to prove that Straton had been summoned. Straton was condemned, expelled from the board of arbitrators, and put under a penalty of complete *ἀτιμία*, but appealed to a law court, which, however, sustained the decision. These closing remarks of Demosthenes must be viewed with suspicion. It is possible that the case came rather late in the year and

34 Viz., *ὑπωμοσῖαι* and *παραγραφαί*, for which *vide infra*, p. 30.

35 It is even more than possible that this was the substance of Midias' complaint against Straton before the college of arbitrators. On this assumption Straton may be supposed to have paid little heed to Midias' pleas for a stay of judgment, and, at the insistence of Demosthenes, to have set a day for the official award and proceeded to condemn Midias by default when he did not put in an appearance. It is quite possible that Straton, egged on by Demosthenes, may have been overstepping his rights. Demosthenes tries to make it seem that Straton was reluctant to condemn Midias by default, but that he, Demosthenes, insisted on a decision; this need not be taken seriously, for, as Ulpian remarks, it is only a part of Demosthenes' general design of whitewashing Straton.

36 Likewise Demosthenes' story to the effect that Midias tried to bribe Straton to report an acquittal must be viewed with suspicion.

37 This would seem to be rather a daring risk for Midias to take on purpose, since he could not be sure of obtaining a condemnation from the college. Furthermore, it was the business of Demosthenes and Straton to be on their guard, if they well knew Midias to be so treacherous a man to deal with.

38 21, 86: *φυλάξας τὴν τελευταίαν ἡμέραν τῶν διαιτητῶν*, [*τὴν τοῦ Θαργηλιώνος ἢ τοῦ Σκιροφοριῶνος γιγνομένην*], *εἰς ἣν ὁ μὲν ἦλθε τῶν διαιτητῶν ὁ δ' οὐκ ἦλθε* κτλ. Cf. Lipsius, p. 232, n. 46, who holds the bracketed words to be an interpolation, and thinks the reference is to the last day of their tenure of office. Goodwin, *ad. loc.*, thinks a special day was set aside for hearing impeachments in one of the last two months of the year, leaving a slight interval before the end of the year. He finds in the fact that Straton was expelled from the board an indication that the yearly tenure of office was not yet over, as does Pischinger also (p. 24). Neither of Goodwin's points seems well taken: (a) The expulsion might have been only formal; (b) no interval need be left before the end of the year, for the arbitrators had ample opportunity of closing out their cases before the end, as remarked above. However, the passage is admittedly hopeless and we cannot expect to determine with certainty whether the meeting of the college came on the last day of the year, or whether or not there were previous meetings for hearing impeachments. Pischinger, p. 24, sees in the words *εἰς ἣν ὁ μὲν ἦλθε τῶν διαιτητῶν, ὁ δ' οὐκ ἦλθε* a contrast with previous well-attended meetings before the final day, on which the careless members stayed away; and he accepts the account of Ulpian, who declares that it was customary for the arbitrators to gather on certain days in *Scirophorion* for the purpose of holding a sort of *εἵθυνα*.

that Midias took the first opportunity of appearing before the college. It was Straton's business to be there; there is no reason to suppose it was necessary for Midias to summon him officially in the usual way;<sup>39</sup> and the fact that the law court held against Straton shows that his case must have been weak. There must have been some definite complaint of unfairness against Straton, which the arbitrators, and later on the judges, thought well grounded. Exactly what it was is difficult to say; probably Midias charged that Straton had not given a fair hearing, had refused to grant a continuance, and had deliberately condemned him by default, though well aware that Midias had not had sufficient time to prepare his case.

#### LEGAL EFFECT OF THE IMPEACHMENT

When an arbitrator was impeached, was the award given by him in the arbitration thereby nullified? Now Demosthenes admits that he was never able to collect any of the money that Midias was condemned to pay when he lost the arbitral decision by default; he had even brought a *δίκη ἐξούλης* against Midias to secure his damages, but had been unsuccessful with it also.<sup>40</sup> Under these circumstances it is tempting to suppose that by impeaching Straton, Midias had at the same time secured a virtual quashing of the arbitral decision.<sup>41</sup> At least the failure of Demosthenes to execute judgment against Midias must be explained in this way. Midias probably pleaded in the *δίκη ἐξούλης* that the decision against him had been unfair, as evidenced by the impeachment of Straton, and was therefore not binding. Whoever gave the decision in the *δίκη ἐξούλης* probably considered the argument of sufficient weight to acquit Midias, even if the impeachment did not automatically set aside the arbitral decision. In this light it is easy to explain the neglect of Midias in bringing the *ἀντίληξις τῆς μὴ οὔσης*, even if it was intentional on his part; he perhaps thought best to kill two birds with one stone, by impeaching the arbitrator who had angered him and at the same time nullifying the decision, whereas if he brought the *ἀντίληξις* he would only be upsetting the decision without striking back at the arbitrator. Besides, on purely logical grounds, it is very likely that a decision which was necessarily adjudged improper by the college through its impeachment of the arbitrator would not be held binding.

#### THE COLLEGE OF ARBITRATORS; INSCRIPTIONS

It has been established that the entire body of arbitrators met at least once a year, perhaps oftener, for the purpose of hearing impeachments against members. Were there regular meetings for other purposes? If the account given above, assuming a division of the board into ten panels, one for each tribe, is correct, then it is unnecessary to think of a full session of the entire board for the purpose of drawing

39 So Lipsius, p. 232, n. 46. It would seem on the face of it that this day was set aside for hearing complaints, as a sort of substitute for the *εἵθυνα*. Hence it was the business of any man who had performed an arbitration to be there, especially if he were aware of dissatisfaction.

40 21, 81. This is, however, inconsistent with 91, which declares that Midias *δίκην ἐξούλης ὑπομένει*, i. e., is waiting to have a *δίκη ἐξούλης* brought against him by Demosthenes. The latter account fits better with the supposition that the *δίκαια* was virtually nullified by the *εἰσαγγελία*.

41 So Ulpian on 21, 83.

lots for individual cases.<sup>42</sup> But that the arbitrators met in a college to pass decrees of honor and set up dedicatory offerings we know from inscriptions. Indeed, it is only in connection with these matters that we have any inscriptions relating to arbitration, for no yearly lists of arbitrators as such have come down to us. Meetings for this purpose would obviously come near the end of the year and might or might not be identical with the meeting for the purpose of hearing impeachments. If we may trust the rather uncertain restorations of certain inscriptions, the demos apparently voted a golden crown of honor to the arbitrators for certain years in which the arbitrations had been conducted with great success: *CIA II*<sup>2</sup>, 943, (325/4 B.C.) *Διαιτητα οἱ ἐπὶ Ἀντικλέους ἄρχοντος ἀνέθεσαν στεφανωθέντες ὑπὸ τοῦ δήμου*. *CIA II*<sup>3</sup>, 1182, (337/6 B.C.) *Διαιτητα οἱ ἐπὶ Φρυνίχου ἄρχοντος ἀνέθεσαν δόξαντες τῷ δήμῳ καλῶς καὶ δικαίως διαιτῆσαι*. It was evidently customary for the arbitrators, after receiving the crown from the city, to dedicate it as an offering in some temple, as the quotations above indicate. We also learn from *CIA II*<sup>3</sup>, 1172, that it was customary for the college as a whole to honor with praise and an olive wreath those among their number who had been selected as arbitrators and had faithfully fulfilled their duties: *ἐδόξεν τοῖς διαιτηταῖς ἐπαινέσαι καὶ στεφανῶσαι αὐτοὺς θαλλοῦ στεφάνῳ*.

It has been thought by some scholars<sup>43</sup> that the reference in this inscription is to the scribes who had acted for the arbitrators during the year; however, there is nothing in the inscription itself to warrant a reference to official scribes, of whom there is no mention anywhere else, and it is more natural to suppose that the recipients of the honor were the arbitrators themselves.

It was customary to add to these decrees of honor a list of the names of all the arbitrators for the year. Two such lists have been preserved in a fragmentary state, *CIA II*<sup>2</sup>, 941, of 330/29 B.C., containing 9 names, and no. 942, of 329/8, containing 10 names. No. 943, of 325/4, is a complete list, the only genuine one extant, and contains 103 names. No. 944, a fragmentary list containing 89 names as representatives of four tribes, cannot be regarded as a genuine list of *διαιτητα*. In the first place, the only authority for taking it as a list of arbitrators is a conjecture by Bergk;<sup>44</sup> moreover, Sundwall<sup>45</sup> finds strong statistical grounds for ruling it out. Eighty-nine names for four tribes would correspond to approximately 240 names for ten tribes complete, and the discrepancy between 103, an undoubted and complete list, and 240 would be too great. Therefore we have only to deal with no.

42 Lipsius (p. 232), however, thinks there were regular meetings for this purpose. He reaches this conclusion from the phrase already quoted from Dem. 21, 86, *φυλάξας τὴν τελευταίαν ἡμέραν τῶν διαιτητῶν κτλ*; but just how is not made clear. He apparently thinks that the mention of a chairman (*ὁ πρυτανεύων*) implies the rotation of such chairmen in office from meeting to meeting after the familiar Greek practice. This is hardly conclusive, for even if there were only one meeting a year a chairman would still no doubt be needed.

43 E. g., by Koehler in his note on the inscription, and by Lipsius, p. 232, n. 47; likewise Thalheim in Pauly-Wissowa, though with hesitation. The interpretation here given agrees with the statement in Busolt-Swoboda, *Staatskunde*, p. 1113.

44 *Zeitschr. f. Alterthumswiss.*, VII, p. 270; *Rhein. Mus.*, VII, pp. 130 f.

45 *Epigr. Beitr.*, in *Klio*, 1906, *Ergänzungsband* 1, Beiheft 4, p. 32. Sundwall also notes that twice in this list two brothers are named; now, barring the improbable supposition that they might have been twins, they could hardly have been members of the same board of arbitrators, i. e., sixty years old in the same year.



943, the only complete and authentic list of arbitrators from which reliable conclusions can be drawn.

No. 943 is arranged in six parallel columns of names; the name of the tribe is given first, then beneath it are listed the members by groups according to demes. All ten tribes are mentioned, hence the list is apparently complete. The number of members is uneven; one tribe has 16, another only 3. This is only natural in view of the method of selecting the arbitrators, but it demonstrates the falsity of Ulpian's statement<sup>46</sup> to the effect that there were 44 arbitrators for each tribe. Moreover this list of the entire board of arbitrators was obviously drawn up simply by tribes in the easiest way, not by tribal representation; that is, there is here no question of a division of all the arbitrators for the year into ten equal groups, each one acting for a tribe, in the manner described above. Sundwall observes that 100 arbitrators in round numbers corresponds nicely with the 9,000 citizens in the hoplite census. If the entire body of citizens, about 20,000 for this period, were eligible to be arbitrators in their sixtieth year, we would expect to find an arbitral board of from 225 to 250 men. Hence the fact that our only undoubtedly authentic and complete list of arbitrators has 103 names supports the view that the arbitrators were taken only from the citizens in the hoplite census, Thetes being excluded. Out of the 103 names 12 can be identified as wealthy men, which is a rather low figure for 103 members of the hoplite census, as Sundwall admits, especially since out of the 9 names of No. 941, 3 were trierarchs, and 4 were trierarchs out of the 10 names recorded in No. 942. However, much of this may be purely accident, and since the method of determining the wealth of individuals on the board is necessarily none too accurate, it cannot destroy the validity of his essential conclusions.

46 *Ad Dem.* 21, 86.

## CHAPTER III

## PROCEDURE IN PUBLIC ARBITRATION

## SELECTION OF THE ARBITRATOR

When a case was entered before the four of the Forty acting for the tribe of the defendant,<sup>1</sup> the four magistrates made a brief preliminary examination merely to see whether it was well grounded and brought before the proper magistrates, i. e., *εἰσαγώγιμος*,<sup>2</sup> and how large a sum was involved. Their cursory inspection must not be thought of as a formal *anakrisis*, since in arbitration cases the arbitration itself answered the purposes of an *anakrisis*.<sup>3</sup> But in some cases the magistrates may have summarily decided a special plea of exception brought by the defendant against the admissibility of the suit, a *παραγραφή*.<sup>4</sup> If, however, the case proved sound and subject to their jurisdiction, they accepted it, and, when more than ten drachmas were involved, they proceeded to select an arbitrator by lot<sup>5</sup> from the section of the arbitral board assigned to the tribe of the defendant. The Forty kept official records of the cases received by them,<sup>6</sup> upon which they undoubtedly registered the name of the arbitrator selected to hear the case.<sup>7</sup> To the arbitrator they handed over a *γραμματεῖον*,<sup>8</sup> an official document containing the charges brought by the plaintiff (*ἔγκλημα*),<sup>9</sup> and the damages sought (*τίμημα*). No doubt the *γραμματεῖον* also certified that the suit had been accepted by the Forty; it was for the arbitrator a sort of official notice of election, his bill of instructions. It might perhaps be identified with the *γραμματεῖον* referred to by Aristotle,<sup>10</sup> upon which in case of appeal the arbitrator wrote out his decision, afterwards returning it to the Forty along with all the evidence used in the case. Upon receipt of the *γραμματεῖον* the arbitrator took charge of the case and arranged to hold meetings with the parties.

## OATH OF THE PUBLIC ARBITRATOR

That public arbitrators were under oath we know almost by accident from Aristotle's treatise;<sup>11</sup> for, in describing how the nine archons swore at the oath-stone

1 Cf. *supra*, Ch. II, p. 13; *Ath. Pol.* 53, 2; Lysias 23, 2.

2 Lipsius, p. 845.

3 There was no real *anakrisis* in arbitration cases; cf. Bonner, *Evidence in Athenian Courts*, Chicago, 1905, p. 48 f.

4 For special pleas, *vide infra*, p. 31. There is evidence to show that sometimes the arbitrator heard these pleas.

5 *Ath. Pol.* 53, 2; 53, 5.

6 Isocrates 15, 237; *vide supra*, Ch. II, p. 12.

7 This follows from logical probabilities, from the need of assuring the completion of the arbitration, and from the fact that in case of appeal all the evidence had to be returned to the Forty.

8 Cf. Dem. 52, 14, *λαχὼν δὲ παρὰ μὲν τοῦ διαιτητοῦ ἀνέλετο τὸ γραμματεῖον, προῦκαλέσατο δ' αὐτὸν ἐπιτρέψαι Λυσικλῆδην*. Pollux 8, 127, *ἐλάμβανον δὲ οἱ διαιτηταὶ δραχμὴν παρὰ τοῦ κρίνοντος . . . ἐγράφαντος αὐτοῦ ἐν γραμματεῖῳ τὸ ἔγκλημα καὶ τὸ τίμημα*. When such an agreement to arbitrate privately came after the beginning of a suit, the Forty would have to be notified of the proposed reference in order to keep their records of the case in order; and this may possibly be what is meant in the Demosthenes passage.

9 That a record of the charge was kept on file follows from Dem. 25, 58.

10 53, 2.

11 55, 5.

after passing their *dokimasia*, he incidentally tells us that the arbitrators swore there also: βαδίζουσι πρὸς τὸν λίθον ἐφ' οὗ τὰ τόμι' ἔστιν, ἐφ' οὗ καὶ οἱ διαιτηταὶ ὁμόσαντες ἀποφαίνονται τὰς διαίτας καὶ οἱ μάρτυρες ἐξόμνουνται τὰς μαρτυρίας. Therefore, the only problem here is, When did they take the oath?<sup>12</sup> Just before pronouncing the award, or immediately after election, before entering officially into duty? On the surface Aristotle's words would certainly indicate that the arbitrators went to the oath-stone just before announcing their award, then took the oath and gave the decision. But this is very improbable, for, as Lipsius rightly insists,<sup>13</sup> the award was given only in the official meeting-place, the temple or building assigned to the arbitrators for the tribe in question. Passages in the Orators favor this view, for, though several arbitral awards are described, there is never any mention of retiring to the oath-stone for the purpose of giving the award there; in the *Midias* case of Demosthenes in particular,<sup>14</sup> where events on the day of award are described in great detail, we cannot possibly believe Straton gave his award at the oath-stone. Hence it is probable that just after being notified by the Forty, but before taking charge of the case, the arbitrator swore an oath to conduct the arbitration to the best of his ability in accordance with the laws.<sup>15</sup> Thus the oath was simply another safeguard to assure a successful arbitration.

#### ARBITRATOR'S FEE

When the plaintiff filed his complaint he had to pay one drachma as a fee to the arbitrator.<sup>16</sup> This fee was called the *παράστασις*, and according to Pollux was also paid by the defendant when he signified his intention of contesting the suit by taking an oath, the *ἀντωμοσία*.<sup>17</sup> The two drachmas obtained in this fashion were the only

12 It was formerly thought by some scholars, e. g., Hudtwalcker, *op. cit.*, p. 8, Meier, *Die Diäteten*, p. 21, and Hubert, pp. 32-33, that the public arbitrators swore at the beginning of their year of office all in a group. This is a mistake, for there was no need for an arbitrator to swear unless actually drawn by lot to hear a case, and even the very words of Aristotle show he is thinking only of arbitrators in actual duty. Moreover there is no chance that the quotation from Aristotle refers to private arbitrators, who were not always on oath, and to whom Aristotle does not refer here or anywhere else in the *Ath. Pol.* Cf. Pischinger, p. 18 f., who, however, interprets Aristotle literally and believes the award was given at the oath-stone.

13 P. 228, n. 33: ἐφ' οὗ goes only with ὁμόσαντες, not with ἀποφαίνονται. In another author than Aristotle this might be strange, even impossible.

14 Dem. 21, 84 f. Another passage, Dem. 54, 26, which describes proceedings before the announcement of an award, is thought by Pischinger, p. 19, to agree with the literal interpretation of Aristotle, but the passage is hardly conclusive for two reasons, one a matter of ms. reading, the other, of logic. The opponents of the speaker are described as protracting the time of award until past midnight, by using various obstructive tactics, and in particular by leading the speaker's witnesses to the oath-stone one after another to make them deny certain testimony on oath: τῶν δὲ παρόντων ἡμῖν καθ' ἓνα οὕτως πρὸς τὸν λίθον ἄγοντες καὶ ἐξορκίζοντες. But the mss. here all read βωμόν, not λίθον, which is read by most editors after Harp. s. v. λίθος. But Harp. was also trying to make the Aristotle passage agree with the Demosthenes passage, and his authority is therefore questionable. As Sandys points out *ad. loc.*, in the Demosthenes passage any altar would do for the purpose. But even granting that λίθον is the correct reading and refers to the same stone as Aristotle, the passage has more point if we think of the stone as some distance away from the scene of the arbitration, thus requiring more time in going to and from it.

15 Cf. Busolt-Swoboda, p. 1112.

16 Pollux 8, 127; cf. 39. Lipsius p. 231, n. 44. Harp., Phot., Suidas, s. v.; *Lex. Segu.*, p. 290, 19.

17 Hubert, p. 34, thinks that only the drachma deposited by the plaintiff was called *παράστασις*, but his view is hardly correct; there is nothing in the accounts of Pollux and Harpocration to indicate that the defendant's fee was not called by the same name, and we should rather expect them to mention it if there were a distinction.



remuneration the arbitrator got for his trouble. According to another lexicographical notice<sup>18</sup> the same fee had to be deposited whenever a plea for arrest of judgment (*ὑπωμοσία*) was taken; if the plea were opposed by the other litigant (*ἀνθυπωμοσία*) very likely he too had to deposit another drachma.<sup>19</sup>

#### ARBITRAL HEARINGS

As in the case of private arbitration, meetings before a public arbitrator were called *σύνοδοι*<sup>20</sup> and were very informal in character. They were held in the temple or building assigned to the arbitrators for the tribe of the defendant. The parties came with their witnesses and associates,<sup>21</sup> often assisted by friends and relatives. The hearings were open to the public and often attracted quite an audience. Attendance was not compulsory for the parties except on the day of award.<sup>22</sup> The powers of the arbitrator were not great, and he apparently exercised little control over the litigants;<sup>23</sup> he could, however, demand of them an answer to his questions<sup>24</sup> and make them affirm or deny a statement on oath.<sup>25</sup> He could, of course, decide against a refractory litigant, but since the arbitral decision was always subject to appeal without prejudice to the case of either party there was no great fear of alienating the sympathy of the arbitrator. The number of meetings naturally varied according to circumstances; sometimes many<sup>26</sup> were needed before all the evidence could be considered by the arbitrator sufficiently for him to reach a decision. But a case could never remain with the arbitrator longer than one year, since the arbitrators held office for one year only. If necessary, the arbitrator could name an official day for the award, decide against a litigant who failed to appear, and leave him to upset the award by the *ἀντιληξίς τῆς μὴ οὔσης* (*q. v., infra*, p. 33).

The first duty of the arbitrator was to attempt to bring about a reconciliation between the parties;<sup>27</sup> if he failed in this, as was nearly always the case,<sup>28</sup> he then proceeded to an examination of the evidence.

#### EVIDENCE BEFORE A PUBLIC ARBITRATOR

Procedure before a public arbitrator was in general very similar to that in private arbitration. Each litigant presented his side of the case, and the arbitrator

18 Harp., *s. v.*; the same *apud* Phot., Suid. Cf. Caillemer, *op. cit.*

19 This is the conjecture of Meier, *op. cit.*, p. 13, who, however, errs in thinking that the fee was paid into the public treasury rather than directly to the arbitrator.

20 Dem. 54, 29; 47, 14.

21 Dem. 49, 34; 54, 26; 47, 11; 59, 60.

22 Dem. 21, 84; 39, 37; 47, 45.

23 Cf. Dem. 54, 26, where the arbitrator was apparently powerless to prevent the insolent actions of one party.

24 Dem. 27, 50.

25 Dem. 29, 20. However, if the litigant refused to comply there was probably no way of enforcing the demand.

26 Isaeus XII, 11; Dem. 47, 14; 54, 29.

27 Aristotle, *Ath. Pol.* 53, 2.

28 There is no case on record in which the arbitrator brought about a reconciliation of the parties before rendering a decision, and it is not likely to have often happened. The very fact of being before a public arbitrator itself shows that the litigants were already sufficiently at variance to resort to the courts; if their difficulties were such that they felt inclined to settle out of court, they would no doubt prefer to resort to private arbitration before a man of their own choice.

questioned him regarding the details;<sup>29</sup> the parties had the privilege of cross-examining each other<sup>30</sup> and demanding proof of allegations. By cross-questioning his opponent a litigant could often force him to make an admission to his disadvantage, or reveal the arguments he intended to use in case of appeal;<sup>31</sup> hence a frequent tactical maneuver was to attempt to surprise the opposition with unexpected evidence presented to the arbitrator as late as possible before the announcement of the award.<sup>32</sup> A party could also demand that his opponent read aloud, or give copies<sup>33</sup> of, the written evidence he presented to the arbitrator. But one litigant could not force another to sign a deposition before the arbitrator that might prejudice his case.<sup>34</sup> Accounts and records of the matter in dispute were often produced before the arbitrator.<sup>35</sup> That the parties quoted laws copiously in their pleadings we know from Aristotle<sup>36</sup> and numerous passages in the Orators.

#### CHALLENGES

One means of proof popular in arbitral procedure was the tendering of a challenge to an opponent. The challenge might take various forms. For example, one party might challenge the other to submit the case to a private arbitrator and abide by his decision.<sup>37</sup> Again, the challenge might be to let the case rest upon the proof of a certain allegation before the public arbitrator.<sup>38</sup> A frequent form is found in the challenge of an opponent to give up for torture a slave whose evidence could be used to settle the case; or, one party could affirm willingness to surrender a slave and challenge the opposition to accept the evidence given under torture as final proof. This sort of challenge to torture a slave for evidence was called *πρόκλησις εἰς βάσανον*.<sup>39</sup> But the challenge to swear an oath, or the offer to swear one, the *πρόκλησις εἰς ὄρκον*, was perhaps most popular of all. There are many references to it in the Orators,<sup>40</sup> and it even appears that it was by no means unusual to settle cases entirely upon the evidence furnished by such an oath.<sup>41</sup> A party could agree to swear an oath later and deposit money as a forfeit in case he should fail to take the oath at the proper time.<sup>42</sup> The arbitrator apparently regarded a challenge as of paramount importance and not infrequently gave decision against the party who refused to accept one. Acceptance of a challenge might bring about a postponement of the arbitral award in order that the parties might have time to carry out its provisions.<sup>43</sup>

29 Dem. 27, 50.

30 Dem. 49, 55; 27, 51; 54, 26 f. Cf. Bonner, *op. cit.*, p. 52-53.

31 Lysias X, 6; Dem. 49, 21-34; 41, 12; 36, 18-33.

32 Dem. 28, 1; 54, 27.

33 Dem. 54, 26; 49, 43.

34 Dem. 49, 55.

35 Dem. 27, 49; 49, 44.

36 53, 2.

37 Dem. 52, 14.

38 For example, in Dem. 27, 50, Aphobus challenged Demosthenes that he was willing to prove Demosthenes' estate amounted to only ten talents and make up the difference if it fell short of that figure. Demosthenes bade him prove it to the arbitrator, but Aphobus was unable, and that was one of the chief reasons why the arbitrator decided against him.

39 Dem. 47, 13; 54, 27.

40 Cf. Isaeus XII, 9; Dem. 33, 13; 49, 55; 59, 60.

41 Dem. 49, 65; 39, 3-4; cf. 40, 10-11; 59, 60.

42 Dem. 33, 13.

43 Dem. 47, 13; 54, 27.

## TESTIMONY OF WITNESSES

But the most frequent form of evidence was the testimony of friends and others as witnesses. A witness usually acknowledged before the arbitrator an affidavit written out beforehand,<sup>44</sup> especially when deposing to facts that occurred long before the meetings with the arbitrator. But oral testimony also could be used before the arbitrator if occasion arose, being, however, at once set down in writing;<sup>45</sup> this was the rule when bystanders were called upon to witness a challenge made before the arbitrator. When the deposition was prepared beforehand it was usually written in black pigment on a wooden tablet covered with gypsum (λείκωμα); but when drawn up hurriedly before the arbitrator a wax tablet was used, to allow of additions and erasures at the request of witnesses before they attested it.<sup>46</sup>

## SUMMONING OF WITNESSES

It does not appear that a witness could be forced to appear before the arbitrator against his will, but on the contrary it was incumbent upon the litigant to secure from him a promise of assistance by whatever means of persuasion he could devise and then notify him to be present at the arbitration.<sup>47</sup> However, if a witness had promised to be present and furnish testimony on some particular point, if he then failed to appear on the appointed day he could be prosecuted for default by the action called *δίκη λιπομαρτυρίου*.<sup>48</sup> The action was lodged with the arbitrator, who collected another fee of one drachma from the complainant.<sup>49</sup> The arbitrator no doubt gave a decision in the action which could be appealed to a law court by either the complainant or the defaulting witness.<sup>50</sup> The latter, if found guilty, was liable to a fine, the amount of which was determined by the jury; it was paid to the complainant, not to the state. Lipsius plausibly assumes<sup>51</sup> that the case against the witness had to be settled first, delaying action in the main suit. A damage suit (*δίκη βλάβης*) could also be brought against a defaulting witness, but probably only in case the suit for default was unsuccessful.<sup>52</sup> A formal court summons of a witness, the *κλήτευσις*, was not used in arbitration.<sup>53</sup>

Even when forced to appear, a witness could still avoid giving testimony by taking an oath of disclaimer, the *ἐξωμοσία*,<sup>54</sup> swearing that he knew nothing of the matter. He was thenceforth excused from further attendance without any risk to himself even if he swore falsely.<sup>55</sup> But if there were some particular fact in the

44 Dem. 46, 11. Cf. also Isaeus XII, 11; Dem. 27, 51; 29, 7; 54, 26.

45 Dem. 46, 11; cf. 29, 31; 47, 13; 54, 26. Oaths and challenges might come under this head.

46 Dem. 46, 11.

47 Cf. Bonner, *op. cit.*, p. 41.

48 Dem. 49, 19; Bonner, *loc. cit.* Cf. also Pollux 8, 36; Phot. *s. v.*; *Lex. Segu.* V, 276, 13. Lipsius, pp. 784 f.

49 So Lipsius, *loc. cit.*

50 The only case on record is found in the Demosthenes passage (49, 19), where the facts are hard to determine. There it seems that the arbitrator acquitted the defaulter, and the complainant did not appeal to a court, but afterwards brought a damage suit against the witness.

51 *Loc. cit.*

52 Bonner, *loc. cit.*

53 Bonner, *op. cit.*, p. 43.

54 Dem. 45, 20; 29, 20.

55 Dem. 49, 20; Pollux 8, 37. Cf. Bonner, *op. cit.*, p. 43.



deposition to which he refused to subscribe, it could be amended to suit him.<sup>56</sup> The witnesses of either party could be put on oath by the opponent.<sup>57</sup> An official list of witnesses was apparently kept; it was no doubt filed with the arbitrator by both parties.<sup>58</sup>

#### FILING OF EVIDENCE; 'Εχίνοι

As stated above, all the evidence presented before the arbitrator was either in written form or reduced to writing on the spot. It seems that the litigants themselves were obliged to furnish the written documents to the arbitrator. If need arose to reduce oral testimony to writing, one or both of the litigants had their slave secretaries present to make the copies.<sup>59</sup> Though he doubtless kept his own memoranda for personal use, the arbitrator was relieved of the troublesome duty of making a full official record of the case; all he had to do was to put the documents on file. There is no indication that an arbitrator could reject any documents presented by a litigant, no matter how irrelevant. There was a practical reason for requiring the litigants to furnish written documents. The arbitrators were not paid by the state, and collected only one drachma as a fee from each litigant. Hence it would be unreasonable to require them to furnish a secretary to record all the testimony and evidence. It was only right that the expense be borne by the litigants themselves.

Thus all laws, challenges, and affidavits used in the hearings before the arbitrator were presented to him in writing. He took charge of the documents thenceforward, depositing them in urns called ἐχίνοι. The technical expression for filing evidence in this manner was ἐμβαλεῖν εἰς τὸν ἐχίνον, Dem. 45, 17; or simply ἐμβαλέσθαι, Dem. 28, 1.<sup>60</sup> There was one urn for each litigant, and for purposes of appeal the evidence used by each party was kept separate, that presented by the plaintiff being sealed in one urn,<sup>61</sup> that used by the defendant in the other. The urns were no doubt either furnished by the litigants themselves or by the state; in the latter case they were probably used year after year by the arbitrators. They were not sealed until the arbitrator gave his award and ascertained whether the parties intended to abide by it or not;<sup>62</sup> in the meantime the arbitrator had them in keeping and was supposed in some way to guard against their being tampered with.<sup>63</sup> 'Εχίνοι are mentioned in the Orators only in connection with public arbitration.<sup>64</sup>

56 Dem. 45, 87; 46, 11.

57 Dem. 54, 26.

58 Dem. 29, 15.

59 Dem. 29, 11. Cf. Bonner, *op. cit.*, p. 53. This happened especially when challenges were tendered before the arbitrator, and when one party wished to put his opponent's answers to questions on record (ἀπόκρισις).

60 Cf. *Ath. Pol.* 53, 2.

61 *Ath. Pol.* 53, 2.

62 *Ath. Pol.* 53, 2. However, Aristotle's language is free and need not mean that the arbitrator did not take charge of the urns and the documents deposited in them until the time of award, as Calhoun argues, "Perjury Before Athenian Arbitrators," *Classical Philology*, X, 5.

63 Cf. Dem. 45, 58. The speaker charges that while he was busy putting a witness on oath Stephanus stole an affidavit out of the urn. He at first supposed the arbitrator had tampered with the urn.

64 Cf. Sandys' note on the *Ath. Pol.*, *ad loc.*, after Wyse; Bonner, *op. cit.*, p. 48; Lipsius, p. 738, n. 34.

## REQUIREMENT OF WRITTEN EVIDENCE; PURPOSE AND ORIGIN

According to Aristotle's account all the evidence had to be in written form so that the arbitrator might seal it in the urns, and an appeal could be taken only on the evidence enclosed, the law forbidding the introduction of any evidence at the jury trial that had not been sealed by the arbitrator.<sup>65</sup> But there is no indication of how long the requirement had been in force or why. In default of evidence to the contrary, we can only assume that it began with the very introduction of public arbitration soon after 403,<sup>66</sup> and was prescribed by law along with the other provisions already discussed, viz., the law making arbitration compulsory for certain suits, and that forcing the arbitrators to undertake the arbitrations. We have seen, it is true, that Aristotle sometimes passes over changes between the practice of the fifth century and that of his own day without comment. However, his account of written evidence before a public arbitrator agrees with all indications in the early speeches of Demosthenes, and we have consequently no reason to suspect a change in practice here.<sup>67</sup> The reason for the requirement is at once apparent if we remember the practical function of public arbitration in the Athenian legal system—nothing less than an attempt to reduce the number of cases requiring costly hearings in the heliastic courts. An appeal from the arbitrator's decision would require much less time and trouble before the jury, if all the evidence had previously been heard by the arbitrator and filed in writing; both litigants would know exactly what arguments to use and could not plead any lack of preparation. The court would not have to examine the validity of any documents and evidence, since all had been tested previously before the arbitrator; and if it were needful to present the evidence anew to the court it would be a simple matter to have the clerk read verbatim from the documents filed in the arbitration. Reducing all the evidence to writing was therefore a simple but effective means of holding the litigants strictly to the mark. It was especially useful as a safeguard against perjury, since a witness could easily be held responsible for his actual testimony on the record.<sup>68</sup>

Since the requirement of written evidence in public arbitration goes back, so far as we know, to 403, it is immediately apparent that it antedates the use of written evidence in court procedure, which began somewhat later than 380, perhaps in 378/7;<sup>69</sup> and it is by no means unlikely that the requirement of written evidence in court was suggested by public arbitration. But, it may be asked, how did written evidence originate in the first place? How did they first hit upon the idea? Any attempted solution of this problem must remain inconclusive; it is, however, very tempting to suggest that private arbitration was the ultimate source of the practice. Proce-

65 *Ath. Pol.* 53, 2; 53, 3. For possible exceptions to the rule, *vide infra*, s. v. Appeal.

66 The offer to furnish witnesses made by the speaker in Lysias X, 5 (384/3 B.C.), does not prove that the evidence heard by the arbitrator was not in written form; they may have simply come up to acknowledge their testimony before the court: Cf. Bonner-Smith, *Administration of Justice*, p. 357. The same holds for Lysias XXXII, sections 18 and 27, dated soon after 401 B.C.

67 A law requiring written evidence is referred to in *Apollodorus v. Stephanus*, Dem. 45, 44, where the speaker asserts that the reason for it was to make sure no change could be made in the testimony. Cf. also Dem. 47, 8.

68 He could be attacked by a *δίκη ψευδομαρτυρίων* if the case were lost on the basis of his false testimony; *vide infra*.

69 Cf. Bonner-Smith, *Administration of Justice*, pp. 357-62.

ture in private arbitration was often very lengthy,<sup>70</sup> especially in an intricate case where the facts were under dispute. Furthermore, the arbitrator chosen by the parties and empowered to give a binding decision on his own authority was in a position of great responsibility. He could not afford to rely on memory alone, but would need all the facts at his finger-tips. Hence we must assume that from early times private arbitrators adopted the habit of taking notes for their own personal use; no doubt they also often requested the parties to put down evidence in writing,<sup>71</sup> especially when the evidence was disputed or the points at issue were complicated. This sometimes amounted to a virtual written record of the case. The convenience of the practice recommended itself almost immediately, being subsequently adopted and made compulsory for public arbitration.

#### PERJURY IN ARBITRATION

Perjury was very common in both private and public arbitration, as we know from abundant references in the Orators. Two problems now present themselves: (a) Could a prosecution for perjury (*δίκη ψευδομαρτυρίων*) be brought for false evidence before an arbitrator? (b) Was the *δίκη ψευδομαρτυρίων* itself subject to arbitration? Both these questions may be given a negative answer.

(a) We have the express statement of Demosthenes that in private arbitration no prosecution for perjury was possible.<sup>72</sup> This might seem strange at first sight, since there was no appeal from the decision of a private arbitrator. But the Demosthenes passage furnishes an explanation. It was relatively easy to demonstrate the falsity of testimony before an arbitrator;<sup>73</sup> the parties could cross-examine each other, challenge each other to take oath, and test the truth of evidence in many other ways. Hence it devolved upon the interested party to prove his point to the satisfaction of the arbitrator, and if he failed to do so, he slept on his rights and had no one to blame but himself. Now there was even less need of an immediate prosecution for false testimony in public arbitration, where the decision was always subject to appeal. Although the Demosthenes passage refers to private arbitration, it need not be interpreted as excluding public arbitration from the rule; on the contrary, he was probably thinking of both types in common.<sup>74</sup> Furthermore, there are several clear indications in Demosthenes that a prosecution for perjury in connection with an arbitration case could be started only after the decision of the jury court.<sup>75</sup> It was only when the false testimony deceived the jurors and influenced their verdict that the suit could be lodged.<sup>76</sup> It has also been pointed out that delay and complications almost intolerable would have arisen if litigants were permitted to instigate proceedings for false witness before the arbitrator.<sup>77</sup> It may there-

<sup>70</sup> In Dem. 40, 16, the private arbitrator died before being able to render an award; in 52, 15, one of the parties died.

<sup>71</sup> In Dem. 34, 20, there is found an example of written evidence in the form of an affidavit presented to a private arbitrator.

<sup>72</sup> 34, 19.

<sup>73</sup> Cf. Dem. 41, 29; 48, 40.

<sup>74</sup> Bonner, *op. cit.*, p. 90 f.

<sup>75</sup> Cf. Dem. 29, 7; 45, 8-10-18; and especially 47, 1-3.

<sup>76</sup> Dem. 47, 1-3.

<sup>77</sup> Cf. Calhoun, "Perjury Before Athenian Arbitrators," *Classical Philology*, X (1915), 1 f. Lipsius, p. 782, n. 17, regards the matter as still in doubt.



fore be regarded as fairly certain that no prosecution for perjury could be brought for testimony before a public arbitrator.

(b) There is little evidence to show whether the prosecution for perjury itself was subject to arbitration. Lipsius<sup>78</sup> holds the highly reasonable and convincing view that the perjury suit was brought before the same magistrates who had received the original case. But what would happen if the original case belonged to the Forty, who, to judge from Aristotle's account, sent all their cases to public arbitrators? A perjury suit arising in connection with the main suit would come under their jurisdiction; would it then be sent to an arbitrator? Apparently not. We must assume that in such a situation the Forty themselves would hold an *anakrisis* and introduce the perjury case before a court. For one passage in Demosthenes,<sup>79</sup> which describes a challenge in connection with a perjury suit given in the market-place before the jury trial took place, leads us to believe that no arbitrator was present. In another place<sup>80</sup> Demosthenes mentions an *ἀνάκρισις τῶν ψευδομαρτυριῶν*. This practically rules out the possibility of arbitration, since there was no *anakrisis* when a public arbitrator heard a case.

#### TIME OF AWARD; Παραγραφή

After holding as many hearings as he thought sufficient, the arbitrator chose an official day for announcing his decision, technically called the *κυρία ἡμέρα*.<sup>81</sup> On this day both parties were supposed to appear, *ἀπαντᾶν*. Before the arbitrator set the final day, however, several things could be done to effect a postponement of the award. For example, at any time previous to the decision the parties could agree to refer their disputes to a private arbitrator.<sup>82</sup> They would then notify the public arbitrator of their intention, and he no doubt reported to the Forty that the case had been taken out of his hands. The parties had to enter officially upon the record of the case in the hands of the magistrates the name of the private arbitrator they had chosen.<sup>83</sup> Now in case the private arbitration proved abortive, what happened? Could the parties resume the case exactly where it had left off, merely returning to the same public arbitrator? Or would they have to institute proceedings all over again from the very beginning? These questions can hardly be answered decisively. If we assume that the case could be merely reinstated before the same public arbitrator, it is then easy to explain the particular care taken to keep a record of the reference to private arbitration; moreover, it is on this basis that we could best explain a passage in Demosthenes where a private arbitrator is said to have been unwilling to decide a case, but "sent the parties back to the law court."<sup>84</sup>

78 P. 781.

79 29, 11 f. Demosthenes calls up in court witnesses to the challenge. If the challenge had been given before an arbitrator the testimony would hardly have been given in this manner, since the challenge would be on file along with the rest of the evidence heard by the arbitrator.

80 47, 10.

81 Dem. 21, 84; 49, 19; Pollux 8, 60; *Lex. Cantabr.*, s. v. *μη οὔσα δίκη*. Cf. also Dem. 28, 1; 47, 45; 54, 26. It was not fixed by law; therefore the *martyria ap.* Dem. 21, 93, which implies it was, must be regarded as false.

82 Dem. 52, 14. A reference to private arbitration after the decision of the public arbitrator but before the trial by jury was probably not allowed; cf. *Ath. Pol.* 53, 2, and Wyse, *Isaeus*, p. 449.

83 Dem. 52, 30; 40, 16.

84 34, 21.

However, if much time were spent in the abortive arbitration before the parties wished to resume their case, it would then, of course, be out of the question for them simply to return to their former public arbitrator, since he might well be out of office. The parties would then have to start again from the very beginning. They certainly did so in one case where the private arbitrator died before rendering an award.<sup>85</sup> Perhaps on the whole it is safer to conclude that they could not reinstate their case under the same public arbitrator.

The award could also be postponed (*ἀναβάλλεσθαι*) if both the parties agreed to it.<sup>86</sup> If a challenge were given and accepted before the arbitrator, proceedings were adjourned to give the parties sufficient time to carry out its terms.<sup>87</sup> Demosthenes implies by his language in the Midias case<sup>88</sup> that once the official day of award arrived a litigant could refuse to agree to any further postponement and insist that the arbitrator give a decision. The truth is, however, that it depended mainly on the arbitrator, who was supposed to pronounce an award on the official day anyhow; if a litigant failed to appear he decided against him by default, *in contumaciam*.<sup>89</sup> But even on the official day there was still one last recourse for a litigant who wished to postpone the award; he could object to the announcement of an award by interposing a sort of demurrer (*παραγράφεσθαι*), maintaining upon oath (*ὑπόμνησθαι*) illness or absence from the city as an excuse for further delay in the arbitration.<sup>90</sup> If the arbitrator disregarded this plea and proceeded to condemn him by default, the litigant could afterwards bring a motion to have the decision in default set aside on these grounds, *ἀντιλαχεῖν τὴν μὴ οὖσαν*.<sup>91</sup> Our knowledge of the existence of this peculiar type of special plea before an arbitrator rests upon lexicographical evidence; but it cannot be doubted, since twice in Demosthenes we read of *παραγραφή* and *ὑπωμοσία* before an arbitrator, brought apparently on the very day of award for the specific purpose of either delaying the decision or securing a pretext to have the decision *in contumaciam* set aside later.<sup>92</sup> Hence we must recognize a peculiar kind of *παραγραφή* used only in arbitration, to be distinguished from the more usual demurrer or special plea known to Attic law, in which the jurisdiction of the court was questioned, or a bar to action in the case was pleaded.

85 Dem. 40, 16.

86 Dem. 47, 14. Cf. 21, 84.

87 Dem. 47, 13; 54, 27.

88 21, 84. This has some element of truth, no doubt, but it must be remembered that Demosthenes' constant purpose in the Midias passage was to whitewash the conduct of the arbitrator Straton; hence he tries to make it appear that he, Demosthenes, insisted upon the condemnation of Midias in default, and was solely responsible, Straton being utterly powerless in the matter.

89 For default, *vide infra*, p. 33.

90 Dem. 21, 84, with Ulpian *ad loc.*; 39, 37; 47, 45. Cf. Pollux 8, 60; *Lex. Cantabr.*, s. v. *μὴ οὖσα δίκη*. Lipsius, p. 229, n. 37.

91 Pollux 8, 60; *Lex. Cantabr.* s. v. Cf. Lysias 32, 2; Isaeus XII, 11; Dem. 21, 86; 39, 37-38; 40, 17-18.

92 This was undoubtedly the case in Dem. 21, 84, where the special plea was denied by Straton, and in 47, 45, where the arbitrator probably granted a delay. Perhaps also the case in 39, 37 f. If the ordinary kind of special plea were meant in these passages, it is hard to explain why the litigants waited until the very day of award before filing it.

## SPECIAL PLEAS

It may be asked whether the common type of special plea was ever heard by an arbitrator. Some writers, including Lipsius,<sup>93</sup> have held the view that the filing of a special plea ruled out the possibility of arbitration. According to this view, immediately upon the lodging of a suit with the Forty the defendant would enter an objection to its admissibility; the Forty would thereupon either refuse to accept the case, or admit the special plea and send the case to a court, which would rule upon the special plea and decide the issue of the main suit at the same time. This is a simple solution of the problem and would seem to agree with the facts in most speeches delivered in connection with special pleas; for in most cases we either have no sign of an arbitrator, or know from internal evidence that one could not have heard the special plea before its entrance into court.<sup>94</sup> But in *Apollodorus v. Phormio*, Dem. 36, an arbitrator had heard the case although it came into court on a special plea.<sup>95</sup> On the strength of this Calhoun concludes<sup>96</sup> that a *παραγραφή* could be filed with the arbitrator as well as with the instructing magistrate; that the arbitrator could decide questions of admissibility, and deny a special plea that was evasive, and that a special plea, whether filed with the Forty or with the arbitrator, followed the usual course of arbitration. That a special plea sometimes followed the usual course of arbitration seems an inevitable conclusion from the speech of Demosthenes just cited; but in reaching this conclusion Calhoun denies the existence of the special kind of *παραγραφή* before an arbitrator discussed above, suggesting that in the Demosthenes passages only the usual kind of special plea was meant.<sup>97</sup> This would seem to be going too far; Dem. 36 does show that an arbitrator sometimes heard special pleas, but it is only one case against others, and there is no good reason to deny the special kind of *παραγραφή* used in arbitration. Indeed, it seems hardly possible to deny it without also rejecting the *δίκη μη οὔσα*, which surely few would venture to do. But the view apparently held by Lipsius is also too extreme. For on this assumption the Forty would either grant or deny on their own authority the privilege of bringing a special plea; if they refused the objection of the defendant, he would be disbarred from entering his special plea and be forced to go before the arbitrator in the usual way, but if they granted the objection the case would go at once into court without the usual preparation before the public arbitrator. This is ascribing too much authority to the Forty. Certainly we must suppose that often the facts alleged in support of the defendant's special plea might be subject to dispute and would need investigation. Now there was no *anakrisis* in cases brought before the Forty, since the hearing before the arbitrator took the place of it. Hence it seems very reasonable to suppose that if there were any doubt about the validity of the special plea the Forty would not take it upon themselves to decide the matter.

93 P. 835; cf. p. 845.

94 Cf. Isocrates 18, a special plea in a *δίκη βλάβης* (Lipsius p. 656, n. 76), which would come up first under the Forty. Sections 8, 10, and 54 show by the introduction of oral evidence that no arbitrator had heard the case. The same suit occurs in Dem. Or. 38, with no reference to a public arbitrator.

95 Or. 36, sections 18, 33, and *passim*; Or. 45, sections 10 and 17.

96 *Παραγραφή and Arbitration*, "Classical Philology," XIV, 1919, pp. 20-28.

97 Calhoun, *op. cit.*, p. 25.



Nor could they afford to send every case recklessly into court the moment its acceptance was demurred to, without bothering to determine whether or not the special plea had any seeming justification. Under these circumstances the only thing to do was to refer the question to the public arbitrator and let him investigate in the usual manner. This would explain how some special pleas in the Orators had apparently gone through arbitration while others had not. On the whole, then, it seems safer to conclude that a special plea was always lodged with the instructing magistrate. He sent it to court at once if the grounds of the defendant's objection were not disputed by the plaintiff; but if any investigation were necessary, the case was referred to a public arbitrator in the usual way. It is hardly credible that a litigant would be allowed to wait until the arbitrator was on the very point of giving a decision in the case before interposing a special plea. The logical place to do it was at the beginning of the suit with the instructing magistrate. It certainly could not be lodged after the arbitral award, for the litigant then had only a choice of abiding by the decision or appealing to a law court on the case as heard by the arbitrator; there was no other possibility. Neither is there any good evidence for assuming that a special plea could be filed with the arbitrator before the award, since the *παραγραφαι* in the speech *Against Midias* and the speech *Against Euergus and Mnesibulus* are best explained as petitions for adjournment as described above. And finally, in *Apollodorus v. Phormio*, where a special plea had been heard by an arbitrator, there is no reason to assume it was not filed with the instructing magistrates, who then sent it on to an arbitrator because the facts needed investigation and they did not feel competent to admit the demurrer without examination. This manner of treating special pleas would also leave an opportunity for the real purpose of arbitration to come into play, viz., to keep litigation out of the courts. For the arbitrator could always attempt to reconcile the parties first of all; if this failed, he could then hear the facts in the case together with the arguments in support of the special plea, give an award, and let the parties accept it or appeal.

#### ARBITRAL DECISION

On the official day the arbitrator announced his decision. The usual technical expression for this is *ἀπόφασις* or *ἀποφαίνεσθαι (τὴν δίκαν)*;<sup>98</sup> but the more general terms *γνώσις* and *γινώσκειν* are also proper.<sup>99</sup> A decision in acquittal is *ἀποδικοταξίς*, in conviction, *καταδικαίωσις*. To secure the conviction of an opponent before an arbitrator is *καταδικαίωσθαι*.<sup>100</sup> The arbitrator's award was always in writing,<sup>101</sup> and he probably wrote it out beforehand and read it aloud to the parties from his tablet. Immediately after the announcement and before the close of the same day the arbitrator handed in his decision to the Forty<sup>102</sup> along with the evidence in the case. This was a strict regulation, necessary in order to put the decision on record and make it a legally binding document.

98 Dem. 47, 45; 54, 27; Aristotle, *Ath. Pol.* 55, 5; Lipsius, p. 230. On the technical vocabulary of arbitration cf. K. Schodorf, *Beiträge zur genaueren Kenntnis der Attischen Gerichtssprache*, Würzburg, 1904, pp. 38-45.

99 *Ath. Pol.* 53, 2.

100 Dem. 49, 19; cf. 40, 18.

101 *Ath. Pol.* 53, 2.

102 Dem. 21, 85; cf. Ulpian *ad loc.*

## DEFAULT

The parties were supposed to be present to hear the decision. We infer from language in Demosthenes that it was customary for the arbitrator to wait until sunset for a party to appear;<sup>103</sup> if he still failed to arrive the arbitrator then gave decision against him by default, *in contumaciam*, regardless of what the decision would have been had he appeared. A decision in default was called ἔρημος δίκη, or simply ἡ ἔρημος;<sup>109</sup> the arbitrator was said to ἐρήμην καταδικοῦν τινός.<sup>105</sup> Needless to say, it was nearly always the party who expected to lose the decision who failed to appear.

## QUASHING OF A DECISION GIVEN IN DEFAULT

If a litigant claimed that he had been prevented from appearing before the arbitrator by illness or absence from the city or some other valid reason, he could bring a motion to have the decision *in contumaciam* set aside on these grounds. Such a motion was called δίκη μὴ οὔσα,<sup>106</sup> the appellant was said to ἀντιλαχεῖν τὴν μὴ οὔσαν (τὴν δίκαιαν).<sup>107</sup> Our knowledge of the procedure is faulty, depending for the most part on lexicographical notices.<sup>108</sup> It is ignored by Aristotle but referred to several times in the Orators. According to the accounts in Pollux and the *Cambridge Lexicon*, which apparently agree with two passages in Demosthenes,<sup>109</sup> a litigant who intended to be absent on the day of award took the precaution beforehand to signify his intention by παραγραφή and ὑπωμοσία, so as to have a plausible pretext for demanding the nullification of the decision in default afterwards. However, we must assume, against the view of Hudtwalcker, that he could bring the motion whether he had taken the precaution or not.<sup>110</sup> A man could not always know in advance whether he would be unable to attend. He might be taken suddenly ill, or even die, as did the demarch in Isaeus XII, 11.<sup>111</sup> The motion for nullification was obviously designed as a remedy in cases of this sort. But the privilege was no doubt very much abused by pettifogging litigants, and we are told that Demetrius of Phalerum objected to this faulty aspect of public arbitration; it may even have been one of the chief reasons for abolishing public arbitration.<sup>112</sup>

According to Pollux<sup>113</sup> the motion had to be brought within ten days after the arbitral decision. Exactly how it was done he does not tell us. The appellant apparently had to swear that his absence had been unavoidable and his cause just,<sup>114</sup> ὑπόμνησθαι. But before whom would the plea be brought? Very likely before the instructing magistrate, not the arbitrator, who turned in his decision to the Forty immediately after the award; at any rate Midias seems to have gone before the

103 21, 84; cf. 49, 19 and 54, 26.

104 Dem. 21, 85; 39, 37; 55, 2.

105 Dem. 40, 17-18; 39, 37; 55, 6.

106 Lysias 32, 2; Dem. 21, 90; 39, 38.

107 Dem. 21, 86; 39, 38.

108 Pollux 8, 60; *Lex. Cantabr. s. v.*, quoted by Lipsius, p. 229, n. 39.

109 21, 84 and 47, 45. *Vide supra*, p. 30.

110 Cf. Hubert, *op. cit.*, p. 49.

111 Cf. Wyse, *Isaeus*, p. 716.

112 *Vide supra*, Ch. I, s. v. Duration of Arbitration.

113 Cf. Photius, p. 267, 12.

114 Dem. 21, 86, with Ulpian *ad loc.*; cf. Thalheim in Pauly-Wissowa.

Forty.<sup>115</sup> There is, moreover, little reason why an arbitrator should have been allowed to grant such a motion. But did the Forty allow or reject the application on their own authority? If not, did they refer the matter to another arbitrator for investigation, or send it to a court? There is no evidence wherewith to answer. On the whole it is best to assume with Thalheim<sup>116</sup> that the Forty referred the matter to a court of law for a decision, since it is improbable that they had authority to decide such a question summarily without some sort of appeal for the litigant. Perhaps, however, if any preliminary investigation were needed, as was often the case, they would send the application first to an arbitrator<sup>117</sup> for investigation before the court hearing. In this case the procedure would then be identical with that in special pleas described above. However that may be, we do know that if the application were granted the arbitral decision was nullified and the parties started their suit all over again, going a second time before an arbitrator, but probably not before the same arbitrator who had given the decision in default. If, however, the party who lost the decision in default failed to protest it within ten days, or lost his motion to have it set aside, the arbitral decision became finally binding.<sup>118</sup> Apparently the case ended then and there; the only appeal open against a decision in default was seemingly the *ἀντίληξις τῆς μὴ οὔσης*, no appeal to a law court being allowed.

#### APPEAL FROM AN ARBITRAL DECISION

When the arbitrator announced the award, either party, plaintiff or defendant, had a choice of two alternatives. He could accept the arbitral decision, or appeal to a jury court, *ἐφίεναι εἰς τὸ δικαστήριον*.<sup>119</sup> When both litigants agreed to abide by the award, *ἐμμένειν τῇ διαίτη*,<sup>120</sup> it became binding, and the case was at an end forthwith. They had to signify their intention to the arbitrator, who then unquestionably made it a matter of record by recording the outcome with the Forty. It is not unlikely that the parties had to sign an agreement to abide by the award. All this had to be done immediately after the decision was announced, for the arbitrator returned the case to the Forty on the same day regardless of the outcome.<sup>121</sup> An award that became binding in this way could without doubt be enforced by a *δίκη ἐξούλης*, as was certainly the case where a decision *in contumaciam* became final,<sup>122</sup> and also in private arbitration.<sup>123</sup>

But if he desired to appeal the decision to a law court the litigant also had to give notice of his intention immediately after the announcement of the award.<sup>124</sup>

115 Dem. 21, 86. So Ulpian *ad loc.*

116 Art. *Διαιτηταί* in Pauly-Wissowa.

117 Caillemier in Daremberg-Saglio, and Gilbert, *Constitutional Antiquities*, pp. 388-91, hold that the Forty sent the application to a second arbitrator who decided on his own authority whether or not to grant the motion. This is very doubtful, for in that case a public arbitrator would really be giving a final decision as a court of last resort, a thing which it nowhere appears the public arbitrators were competent to do.

118 According to Pollux the litigant who asked for an annulment of a decision against him in default had to furnish bail to guarantee payment of his liability in case the arbitral award was sustained.

119 Aristotle, *Ath. Pol.* 53, 2; quoted by Lipsius, p. 230, n. 42.

120 Dem. 40, 31; cf. *Ath. Pol.* 53, 2.

121 Dem. 21, 85; *Ath. Pol.* 53, 2.

122 Dem. 21, 81; cf. 91-92.

123 Dem. 52, 16.

124 Dem. 40, 31 and *Ath. Pol.* 53, 2.



There was almost no prejudice against a party for being condemned by the arbitrator or for appealing the decision. That this was so is obvious from Aristotle's account, from many illustrations in the Orators, and from the nature of public arbitration itself. It was never intended as anything more than an attempt to prevent too many cases from taking up time in court, and a litigant had a perfect right to demand a trial by jury if he wished. There can be little doubt that the great majority of arbitral awards were appealed; indeed, one passage in Demosthenes implies that it was exceptional for a litigant to abide by the arbitral decision.<sup>125</sup> This passage contains the only certain example of the acceptance of an arbitrator's decision by the losing party.

Aristotle tells us<sup>126</sup> that upon an appeal by one of the parties the arbitrator wrote out his decision on a tablet, sealed all the evidence used in the case inside the urns, and attached the decision to them; he then gave them over to the Forty for keeping, and was finished with his duties in the case. The Forty thenceforward had charge of the case and introduced it to a jury court composed of 201 jurors for matters involving less than 1,000 drachmas, but of 401 for larger sums. As stated above, it was not permitted to introduce any new evidence before the jury, but the appellant was confined to the evidence sealed in the urns.<sup>127</sup> In other words, an appeal from an arbitrator's award had to be on the evidence heard by him. Exceptions to this rule are for the most part only apparent,<sup>128</sup> while on the other hand there are numerous passages in the Orators that indicate it was strictly observed.<sup>129</sup>

125 40, 31.

126 53, 2; quoted by Lipsius, p. 230, n. 42.

127 *Vide supra*, s. v. Requirement of Written Evidence. Cf. also Bonner, *op. cit.*, p. 53; likewise Dem. 39, 17; 45, 57-58; 47, 17; 48, 48.

128 Cf. Bonner, *op. cit.*, p. 55. For example, the rule could be waived by mutual consent of the parties, especially by means of a challenge, Dem. 47, 16; 48, 50. The court could authorize the introduction of new evidence. There was no means of preventing the speaker from discussing facts that occurred after the sealing of the urns, Dem. 39, 37-38; he could only be prevented from offering testimony in written form. A litigant could also introduce written evidence to attest the nature of the proceedings before the arbitrator, Dem. 54, 29; 49, 34. A witness who had promised to testify before the arbitrator but had defaulted could perhaps be called to testify before the court, Dem. 49, 20.

129 Cf. especially Dem. 39, 17; 45, 57; 47, 16; 48, 48. In the following passages there are plain indications that the evidence introduced in court had been heard by the arbitrator: Lysias X, 6; Isaeus XII, 11; Dem. 27 *passim*, esp. sections 42 and 51; 28, 1; 36, 18; 36, 33; 41, 12.

## APPENDIX

JURISDICTION OF THE ARBITRATORS: RANGE OF  
CASES COMING BEFORE THE FORTY

As already pointed out,<sup>1</sup> the Forty had jurisdiction over most private suits not otherwise assigned by Aristotle; the monthly suits coming under the *εἰσαγωγαί* were the chief exceptions.<sup>2</sup> Moreover, all cases under the Forty (when more than ten drachmas were involved) were subject to arbitration; these and none others.<sup>3</sup> A case could go to the arbitrators only through the Forty. Pischinger suggests<sup>4</sup> that other magistrates who received private suits applied first to the Forty in order to obtain an arbitrator. It is true that the polemarch did turn over private suits involving aliens to the Forty;<sup>5</sup> but this was only because in reality they were private suits belonging to the competence of the Forty, happening to come first before the polemarch only because he had the supervision of all matters relating to foreigners. Lipsius rejects the view of Pischinger, but his own view is equally open to question. For he insists that other magistrates selected public arbitrators to hear their private suits without the intervention of the Forty.<sup>6</sup> However, in default of any example of such procedure, and in view of clear indications to the contrary in the Orators and in Aristotle 53, 2, where we are distinctly told that the arbitrators returned their cases to the Forty when an appeal was taken by the litigants, we must assume that with the exception of the polemarch other magistrates did not send their cases to an arbitrator at all, but held an *anakrisis* themselves, after which they introduced the case to a jury.<sup>7</sup> In other words, the presence of a public arbitrator in a case normally means that the case was one belonging to the Forty unless it can be proved otherwise. These points have been conclusively stated by Bonner;<sup>8</sup> all that here remains to be done is to subjoin what it is hoped is an approximately complete list of all the cases in the Orators subject to arbitration, since the list given by Pischinger<sup>9</sup> is unreliable.

## ARBITRATION CASES IN THE ATTIC ORATORS

N. B. No attempt has been made in the list below to include all vague mentions of more or less problematical cases. The list includes two classes of suits: (a) those

1 *Supra*, Ch. I, p. 3.

2 *Ath. Pol.* 52, 2. Cf. Lipsius, p. 228, n. 32, who suggests that the time-limit of one month made arbitration impracticable in these cases. Cf. also Isocrates 17, 37-38, where the manner of introducing evidence shows that an arbitrator could not have heard this monthly suit before the jury trial.

3 For possible exceptions, *vide infra*, p. 38, n. 10. There is only one serious exception, Isaeus XII.

4 *Op. cit.*, p. 39; p. 34. He is followed by Thalheim in Pauly-Wissowa.

5 *Ath. Pol.* 58, 2.

6 P. 227, n. 30; p. 228, n. 31. Followed by Busolt-Swoboda, *op. cit.*, p. 1111, n. 5.

7 A clear example of this procedure is found in the case of the archon in *Ath. Pol.* 56, 6; cf. Dem. 48, sections 23 and 31. Lipsius accepts this point and agrees in removing inheritance cases from the number of those subject to arbitration, *Nachträge und Berichtigungen*, p. 981-82. The mention of an arbitrator in a martyr's *ap.* Dem. 43, 31, shows it to be a spurious interpolation.

8 "The Jurisdiction of the Athenian Arbitrators," *Classical Philology*, 1907, p. 407.

9 *Op. cit.*, p. 35-36.

containing specific internal evidence of arbitration; (b) those containing no specific mention of arbitration, but which may reasonably be presumed to have undergone arbitration. Suits under the latter classification have been enclosed in parentheses. The exact identification is often purely a matter of conjecture, but it is hoped this list will answer most practical purposes.

1. *δίκη αἰκείας* (Lipsius, p. 643) (Isocrates 20, v. Lochites.)  
Demosthenes 47. Cf. sec. 45.  
Demosthenes 54, v. Conon.

That this suit came under the Forty is stated in Dem. 37, 33, a speech delivered c. 346/5. By the time of Aristotle it had evidently become one of the monthly suits, cf. *Ath. Pol.* 52, 2.

2. *δ. ἀργυρίου* (Lipsius, p. 726) (Dem. 52, v. Callippus. Cf. sec. 14.)  
(Dem. 39, 25.)
3. *δ. ἀφορμῆς* (Lipsius, p. 725) Dem. 36, for Phormio. Cf. sec. 12.

Aristotle mentions (52, 2) a monthly suit under this name. But he probably had in mind only a specific suit, not all suits of this class, since he qualifies it with a further description. There were sometimes, it seems, suits with the same name, but under different classifications; cf. 11 below. Otherwise we must assume that the Forty lost jurisdiction here as in the case of no. 1 above.

4. *δ. βαιῶν* (Lipsius, p. 637) Dem. 25, 55. Cf. sec. 58. (?)  
(Aeschines I, 62-63. Cf. Lipsius, p. 642, n. 21.)
5. *δ. βλάβης* (Lipsius, p. 652) (Isocrates 16.)  
(Isocrates 18, v. Callimachus. Cf. sections 11 and 12.)  
(Hypereides III (Oxf.), v. Athenogenes.)  
(Demosthenes 38, v. Nausimachus.)  
Demosthenes 39, 37, v. Boeotus *de nomine*.  
Cf. Lipsius, p. 660, n. 89.  
Dem. 48, v. Olympiodorus. Cf. sec. 48.  
Dem. 52, 14, v. Callippus.  
Dem. 55, 2, v. Callicles.

Mercantile suits of this type had to be decided within a month and therefore were not subject to arbitration. As such are probably to be recognized the following: Dem. 33, 12, cf. Lipsius, p. 644, n. 28; p. 657, n. 77. Dem. 37, 22, Lipsius, p. 652, p. 656, n. 74. Dem. 56 (?), Lipsius, p. 657; p. 631, p. 633.

6. *δ. ἐγγύης* (Lipsius, p. 688) (Isaeus V, secs. 1 and 31; cf. Wyse *ad loc.*)
7. *δ. ἐξούλης* (?) (Lipsius, p. 664) (Isaeus V, 22.)  
(Dem. 30, v. Onetor.)  
(Dem. 40, 34. Cf. 21, 81.)

Demosthenes 32, v. Zenothemis, was perhaps of this type, Lipsius, p. 669, n. 119; but probably a mercantile suit without arbitration, cf. Lipsius, p. 633.



8. *δ. ἐπιτροπῆς* Lysias 32, v. Diogeiton. Cf. sec. 2.  
Dem. 27 and 28, v. Aphobus. Cf. 27, 49 f.

Usually considered, e. g. by Lipsius, p. 532 f., as coming under the archon, but without evidence. The presence of arbitral procedure in both cases points to the jurisdiction of the Forty.

9. *δ. κακῆγορίας* (Lipsius, p. 646) Lysias X, 6, v. Theomnestus.  
Dem. 21, 81, v. Midias.
10. *δ. κλοπῆς* under the Forty and subject to arbitration,  
Dem. 22, 27; 24, 114.
11. *δ. προικός* (Lipsius, p. 497, n. 101) Dem. 40, 16-17, *de dote*.  
Dem. 41. Cf. sec. 12.

To be distinguished from the monthly suit under the same name mentioned in the *Ath. Pol.* 52, 2.

12. *δ. χρέως* (Lipsius, p. 725, cf. Lysias Fr. 16 (Thalheim), v. Archebiades.  
p. 717, n. 149) *Vide supra*, Ch. I.  
Dem. 49, 19, v. Timotheus.

Mercantile suits of this type not subject to arbitration are: Dem. 34, v. Phormio, cf. Lipsius, p. 633; Dem. 35, v. Lacritus.

13. *Status Familiae vel Civitatis*<sup>10</sup> Isaeus XII. Cf. sec. 11.  
Dem. 39, 2. Cf. 40, 9.  
Dem. 59, 60.

10 It has generally been thought that such citizenship cases as Isaeus XII were public suits, and hence the presence of a public arbitrator would be irregular. Cf. Wyse *ad loc.*, who suggests a possible way out of the difficulty by conjecturing that during the *διαψήφισις* of 346/5 the thesmothetae were so hard pressed with their duties in connection with the revision of the roll of citizens that they were empowered by an extraordinary measure to commit the preparation of suits arising therefrom to public arbitrators. But the evidence for considering such suits as public suits until after 346/5 is very slight; cf. Bonner, *Jurisdiction of the Athenian Arbitrators*, *loc. cit.* This date is ten years too late for Isaeus, anyhow, and Diller ("The Decree of Demophilus," *Transactions of the American Philological Assn.*, Vol. 63, 1932, p. 193 f.) attempts to demonstrate that prior to this date all such cases were private suits under the Forty; after the Decree of Demophilus they were made public suits; hence Dionysius of Halicarnassus simply made an error in the date of the Isaeus case, discussing it erroneously in terms of the regulations passed in 346. Certainly there was no arbitration in citizenship cases after this date; cf. Dem. 57, in which there is no mention of an arbitrator, but indications that one could hardly have been present (secs. 21; 23; 27; 38; 39; 43; 45; 46; and especially 58). Cf. also Aristotle, *Ath. Pol.* 58, 4, where the thesmothetae are given jurisdiction.

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## APPENDED TRANSLATIONS

1. (P. 1) "And he would often go out into the country himself overseeing and trying to reconcile those who were at variance."
2. (P. 1) "In the fifth year after this, in the archonship of Lysicrates, the Thirty Judges were set up again, namely those called *district-judges*."
3. (P. 2) "The Thirty."
4. (P. 2) "The Forty." The old appellation: "district judges"; or, more literally, "judges by demes."
5. (P. 5) A technical expression difficult to translate: lit., "to prosecute non-existent (suits)," i. e., lodge a complaint against an arbitral decision alleging improper procedure, and thus have it set aside, enabling a litigant to reopen an otherwise finally settled case.
6. (P. 6) "Law."
7. (P. 7) *Lex. Cantabr.*, p. 673: lit., "non-existent suit: (so said) because it was required of those who were contesting sums in excess of ten drachmas that they should take arbitrators for each case; wherefore there actually was a law forbidding the introduction of a case to a jury court unless the facts of the case had previously been examined by the arbitrators."
8. (P. 9) See no. 5 above.
9. (P. 11) "Decision by vote"—used technically of a revision of the list of citizens.
10. (P. 12) *Ath. Pol.* 53, 5: literally, "taking the last of the eponyms (heroes giving their names to the various military age-groups) the Forty distribute to them the arbitrations and select by lot for them the suits which each is arbitrate." The ambiguity is Aristotle's.
11. (P. 13) "Distribute to them the arbitrations," and later, "and select by lot for them the suits which each is to arbitrate."
12. (P. 13) "And the arbitrations which fall to the lot of each arbitrator have to be completed. For the law states that if a man fails to act as arbitrator although of the proper age for it he is to be disfranchised, unless he happens to be holding some public office in that particular year or absent from the country; these latter alone are exempt."
13. (P. 15) Subheading: "Bill of impeachment before the board of arbitrators."
14. (P. 15) "It is also possible to bring an impeachment before the arbitral board, if anyone is wronged by an arbitrator, and if they decide against an arbitrator, the law requires his disfranchisement; but there is an appeal for these also."
15. (P. 18) "Action of ejectment," i. e., *actio rei judicatae*, suit for execution of judgment.
16. (P. 19) *CIA* II<sup>2</sup>, 943: "The arbitrators in the archonship of Anticles dedicated (this) after being crowned by the people."

17. (P. 19) *CIA* II<sup>3</sup>, 1182: "The arbitrators in the archonship of Phrynichus dedicated (this) after being declared by the people to have arbitrated well and justly."
18. (P. 19) From *CIA* II<sup>3</sup>, 1172: "The arbitrators officially decided to commend them and crown them with an olive wreath."
19. (P. 22) Literally, "they march up to the stone on which are the parts of the sacrificial victims, at which likewise the arbitrators after swearing announce the arbitral decisions, and the witnesses take the oath of disclaimer."
20. (P. 36) Literally, "the introducers."
21. (P. 37) English equivalents for the technical Greek names of the various lawsuits are as follows:—
  1. Action for Assault.
  2. Suit for a Sum of Money.
  3. Suit to recover Loaned Capital, Suit for the Capital Sum.
  4. Action for Violence (Forcible Seizure).
  5. Action for Damage Done; Damage Suit.
  6. Action for a Surety, Action to Enforce Payment of Bail
  7. Suit for Execution of Judgment, *actio rei judicatae*.
  8. Action for Guardianship.
  9. Action for Defamation.
  10. Action for Theft.
  11. Action for Dowry.
  12. Action for Debt.

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